Native title law as 'recognition space'?

An analysis of indigenous claimant engagement with law's demands.

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ABSTRACT

This thesis engages in a critique of the concept of Australian native title law as a 'recognition space'. It doing so, it treats native title law as a form of identity politics, the courts a forum in which claims for the recognition of identity are made. An overview of multicultural theories of recognition exposes what is signified by the use of recognition discourse and situates this rhetoric in political and theoretical context. A critique of native title recognition discourse is then developed by reference to the insights of sociolegal scholarship, critical theory, critical anthropology and legal pluralism. These critiques suggest that legal recognition is affective and effective. This thesis highlights native title law's false assumptions as to cultural coherence and subject stasis by exploring law's demands and indigenous claimant engagement with these demands. In this analysis, law's constitutive effect is emphasized. However, a radical constructivist approach is eschewed, subject engagement explored and agency located in the limits of law's constitutive power. The effects of legal recognition discourse, its productive and enabling aspects, are considered best understood by reference to Butler's notion of provisional 'performativity'. Ultimately, claimant 'victories' of resistance and subversion are considered not insignificant, but are defined as temporary and symbolic by virtue of the structural context in which they occur.

RESUMÉ

Cette étude dresse les contours d'une critique du concept de titre aborigène compris comme un espace de reconnaissance (« recognition space ») en droit australien. Pour y parvenir, elle traite du titre aborigène comme d'une forme de politique de l'identité et les cours et tribunaux comme d'un forum ouvert aux demandes de reconnaissances de cette identité. Un panorama des théories multiculturelles de la reconnaissance nous permettra d'appréhender l'usage du discours sur la reconnaissance. Ce panorama situera également cette rhétorique dans les contextes tant politique que théorique.

Une critique du discours sur la reconnaissance du titre aborigène est alors développée à la lumière des études en sociologie juridique, en théorie critique du droit ainsi qu'en anthropologie critique et en pluralisme juridique. Ces théories tendent à montrer que la reconnaissance juridique est émotionnelle et efficace. Notre étude remet en question les conceptions ayant trait à la cohérence culturelle et à l'immobilisme du sujet en explorant les demandes du droit et l'engagement des plaignants indigènes par rapport à ces demandes. Dans le cadre de l'examen de ce processus, l'effet constitutif de la loi est mis en exergue. Cependant, l'analyse se défend d'un constructivisme radical, elle explore plutôt la notion de participation des sujets et elle se place dans les limites du pouvoir constitutif de la loi. Les effets de la rhétorique de la reconnaissance juridique, ses aspects productifs et ses possibilités semblent pouvoir être mieux compris sous le prisme de la notion Butlerienne de 'performativité provisionnelle'. En définitive, les victoires de résistance ou de subversion des plaignants ne devront pas être considérées comme insignifiantes ou négligeables mais l'on en reconnaitra le caractère temporaire et symbolique en vertu du contexte structurel dans lequel elles apparaissent.

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CONTENTS

Introduction

In this thesis I will challenge the description of native title law as a 'recognition space', critiquing the multicultural theories of recognition from which this concept derives by engaging with poststructuralist identity theory, critical theory, critical anthropology, sociolegal studies and legal pluralism. In Chapter One, I set out the origins and application of recognition discourse in multicultural theory in order to explain its prominence in native title law and discourse, its theoretical underpinnings and its political context. In Chapter Two, I summarize the key critiques of multicultural recognition. In light of these critiques, in Chapter Three I explore both the demands that native title law makes of indigenous claimants as pre-conditions to recognition and the engagement of indigenous claimants with those demands. In Chapter Four, I evaluate the engagements identified in Chapter Three to determine the limits of law's constitutive power, reflected in the subject's agency, the individual's capacity to resist or creatively engage law's demands.

Multicultural recognition discourse.

Chapter One provides an overview of multicultural theories of recognition, principally by reference to the writings of Hegel, Taylor and Honneth. The primary features of these intersubjective theories of recognition include the dialectic formation of identity, recognition as a vital human need and the importance of state recognition of the particularity of its legal subjects. These ideas have paved the way for the emergence of *multicultural* theories of recognition. State recognition remains critical in multicultural theories, but the subject is defined exclusively in a context of 'culture'. Culture is understood as identifiable and coherent, and the subject's cultural identity is one of 'belonging to' or 'being defined by' a cultural community. In this way, 'multiculturalism' abstracts from race, by defining cultural difference as the relevant and totalizing difference. It also implies a particular conception of culture that precludes hybridity, ambivalence, internal dissonance or incongruity.

The discourse of multiculturalism, recognition and 'difference' has been appropriated as a basis for mobilization by identity politics movements. In this way, legal discourses of identity rights have been seized for their emancipatory potential. This thesis explores the limitations, dangers and deceptions of recognition discourse and identity politics movements in the context of Australian native title law. For the purposes of this thesis I consider the native title process to be a forum for the adjudication of an identity claim for recognition, effecting the judicialization of indigenous identity politics.

Key concepts and themes.

There are a number of concepts and themes that recur in a relationship of complex interdependence in this thesis. These derive from multicultural theories of recognition and critical responses thereto, and structure my analysis of recognition discourse in Australian native title law. In this chapter, I will attempt to set out these key concepts and the symbiotic or oppositional relationships between them.

A logical starting point is to identify the assumptions made by multicultural recognition discourse. I identify these as the assumptions that:

1. the subject (individual or group) has a fixed identity before law;
2. this identity is coherent, homogenous and unambiguous;
3. in native title law, this identity takes the form of the 'traditional';
4. 'tradition' is the only form of 'authentic' Aboriginal identity that native title law will recognize;
5. the 'authentic' subject must be disoriented (not attuned to law's demands), given that self-interest is not 'traditional' and is therefore de-legitimating;
6. the fixed subject remains static (unchanged) in its encounter with the legal process.

Critical responses to multicultural recognition discourse have challenged all of these assumptions. Critics include poststructuralists, postcolonialists, sociolegal

scholars, critical anthropologists and critical legal studies (CLS) scholars, among others. They have variously countered the first identified assumption, *that the subject has a fixed identity before law*, with alternative identity concepts of fluidity and performativity. The assumption of *coherent, homogenous identity* has been challenged by notions of hybridity, heterogeneity and ambiguity. The definition of coherent identity in the form of the *traditional* has been rejected either on the basis that this places an impossible demand upon contemporary indigenous populations, whose cultural connection has been forcibly disrupted by white settlement and assimilation policies, or on the basis that 'tradition' implies barbarism, primitivism and is therefore a neo-colonial discourse.

This links to the critical response to the fourth demand, which takes the form of a rejection of notions of *'authenticity'* in favour of concepts of performance and ambiguity. It is also connected to a critique of 'partial recognition', in which native title law demands compliance with an identity script as a pre-condition for recognition. The legal definition of an identity norm upon which an identity right is contingent is said to deny the freedom to self-define or remain undefined and to require the participation of subjects in oppressive regulatory regimes. This connects to a more general critique of the judicialization of political struggle, in which imaginations of alternative discourses and modes of political action become 'atrophied' by the existence of an authoritative legal realm for the adjudication of recognition claims.

The fifth assumption, that *self-interest is delegitimating*, has been critiqued on the basis that law has an orienting pull, with inevitably distorting effects and subject consciousness of its demands both necessary and unavoidable. The 'cunning' of recognition discourse is, therefore, that it both requires disorientation and that subjects frame their claims in a way that accords with its demands.[1] The material

[1] I have adopted the adjective 'cunning' from Elizabeth Povinelli, *The Cunning of Recognition: Indigenous Alterities and the Making of Australian Multiculturalism* (Durham and London: Duke University Press, 2002).

rewards which derive from native title are contingent upon a successful but *undetectable* performance of the required identity norm.

The assumption made in recognition discourse that the *subject remains static in its encounter with the native title legal process* is challenged on three grounds. Sociological constructivists argue that native title law in fact *produces* the subjects that it names. Examples of law's productive effect are explored in Chapter Three and challenge the discourse of 'authenticity' in native title law. A further challenge, arising partly in response to the sociological constructivist position, is the challenge of subject agency. Sociolegal scholars, among others, reject the constructivist position on the basis that it denies subject agency. They argue that although the law has a constraining effect on the subject, it also possesses an emancipatory capacity. The relationship between the subject and the law is therefore not one of construction, but of engagement. Engagement implies orientation to law's demands. It may take the form of appropriation, mobilization, subversion or parody. Stasis is juxtaposed with agency, and aligned with passivity, involuntariness or (in CLS accounts) false consciousness. The concepts of construction and agency are often framed in a dynamically oppositional relationship. Chapter Four will interrogate this opposition by applying the concept of performativity to an analysis of Aboriginal claimant engagement with native title law.

Another challenge to the assumption of the static subject critiques the notion of autonomous and coherent normative systems. This challenge takes the form of legal pluralism which emphasizes 'cross-fertilization', that is, the phenomenon of intersection, interaction and mutual exchange between normative systems and legal discourses. It suggests that instead of seeing exchange and hybridity as defiling (by reference to some notion of pure, unadulterated, traditional culture) one might view these exchanges as productive. Further, legal pluralism challenges the characterization of the relationship between law and subject as constitutive, by suggesting that the interaction between them changes both,

influence being mutual rather than uni-directional. Sedimentation can be considered as one of these exchanges. Crucially, critical legal pluralism adds the concept of plural consciousness to understand the relationship between subject and legal system. Chapter Three explores some examples of exchange between the indigenous and common law legal system, yet treats these exchanges sceptically, questioning the receptiveness of the common law to the substance of indigenous 'law' and suggesting that the *illusion* of accommodation and hybridity raises and then dashes expectations of recognition.

Conceptual symbiosis and tension.

This section identifies some additional relationships between the key concepts introduced above in order to shed further light into their interdependence, symbiosis or tension. It has been argued that the particular *demands* which native title recognition discourse makes of indigenous subjects produces the identity script with which they must comply. In adducing the subject's compliance, the materialization of these identity norms, law produces its constitutive effect. The particular demands that law makes of indigenous subjects dictate the form in which that effect is materialized. For example, by demanding coherence and an unambiguous attachment to tradition, the indigenous subject that is successfully interpellated by law will be beckoned to profess an unambiguous attachment to tradition and a profound sense of unified, collective, cultural situatedness.

In Chapter Three, I approach the relationship between this identity script, law's constitutive and regulatory power and subject agency. I explore the employment of common law property language by Aboriginal subjects to describe their connection to land and their framing of descriptions of customs in the form of the propositional normative. I refer to this as the phenomenon of 'sedimentation', though it might also be described as appropriation or caricature. Both of these examples highlight subject orientation to law's demands, arguably proof of subject agency. On the other hand, the demand for difference means that

Aboriginal subjects can be tripped up by their use of common law language of trespass, exclusive possession, obligation and sanction. That is, by using language familiar to the ears of the common law (and its agents) Aboriginal subjects may fail to prove a difference deserving of recognition. Further, the translation of customary and social practices into the language of the propositional normative has a distorting and abstracting effect. It excludes all that falls outside this formulation and can only result in partial recognition.

Finally, in Chapter Four, I use the notion of 'performativity' to locate the scope for subject resistance in the limits of law's constitutive power. I explore the fissures within native title identity categories and the subject's potential to subversively parody these norms in excess. I investigate the paradox of the subject's capacity to resist hegemonic discourses even while being formed by them. Both the act of parodying in excess and of failing to materialize as the defined identity norm might be characterized as subversive acts of agency. From one perspective, conscious performance is evidence of orientation, strategy and agency. From another, the power of law to compel performance renders voluntariness illusory, indeed part of the ingenuity of recognition discourse. This brings us to the debate about performance, agency, law's constitutive effect and the 'cunning' of recognition discourse. Although orientation and constitution initially appear to be in a relationship of opposition, Butler explores their complex interrelationship in the power of law to compel performance in such a way as to produce a natural affect, and erase the signs of performance. From this perspective, the phenomenon of sedimentation may be classified as one way in which legal recognition discourse impels the subjects it names as they adopt the language and form it prescribes.

Performance is framed by native title recognition discourse as in a relationship of opposition with 'authenticity', and aligned with orientation or self-interest. As the court seeks 'authenticity' as a condition for the reward of native title, Aboriginal subjects aspire to authenticity in the presentation of their identities for its

inspection, yet the court deems their orientation inauthentic. Whether the indigenous claim of cultural authenticity is naïve or creative is the subject of analysis in Chapter Four. So too is the danger that indigenous subjects may internalize the demand for authenticity as an aspiration and, by falling short of its impossible demands, deem themselves failures of indigeneity.

Existing legal literature on native title law 'recognition'.

Native title law has rarely been considered as a forum for the recognition of identity claims. The two primary exceptions to this general rule are the writings of Noel Pearson and Elizabeth Povinelli. Noel Pearson explains his concept of native title as a 'recognition space', from which the title of this thesis derives, as follows:

> Fundamentally, I proceed from the notion that native title is a 'recognition concept'. The High Court tells us in *Mabo* that native title is not a common law title but is instead a title recognised by the common law. What they failed to tell us, and something which we have failed to appreciate, is that neither is native title an Aboriginal law title. Because patently Aboriginal law will recognise title where the common law will not. Native title is therefore the space between the two systems, where there is recognition. Native title is for want of a better formulation the recognition space between the common law and the Aboriginal law which [is] now afforded recognition in particular circumstances.[2]

Pearson argues that the concept of a 'recognition space' enables us to see two systems of law running in relation to land; that is, regardless of the common law, Aboriginal law will continue to allocate entitlement to those traditionally connected with the land. 'Aboriginal law is not thereby extinguished because it survives as a social reality.'[3] Pearson describes native title as a space *between* two legal systems, colonial and Aboriginal, 'where there is recognition'. There is an

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[2] Noel Pearson, "The Concept of Native Title at Common Law" in Galarrwuy Yunupingu ed., *Our Land is Our Life: Land Rights – Past, Present and Future* (St Lucia and Portland: University of Queensland Press, 1997) at 154.

[3] *Ibid* at 155.

ineluctable tension between Pearson's evocation of a space *within which* recognition occurs, and the space, or gap, *between* systems wherein recognition is not possible. In the above extract, Pearson gestures towards the fallacy of an organic 'native title', inherent in Aboriginal customary law and passively awaiting the acknowledgment of common law ('neither is native title an Aboriginal law title'). He notes the extension of 'Aboriginal law title' beyond the contours of 'native title' recognized by the common law. He also indicates 'who' (the common law) is doing the recognizing, the situatedness of the recognizer defining the parameters of the 'recognition space'. Nonetheless, he proceeds from the basis that 'native title is a "recognition concept"'.

Pearson's characterisation of native title law contrasts to that of Michael Dodson's. The latter states:

> Let us be quite clear what native title is. Native title is the recognition of remnant rights over the land. It continues the arrogance and power imbalance of colonisation by failing to acknowledge the validity of indigenous law other than by reference to the law of conquest.[4]

The richness of 'recognition' discourse as a subject of critique is evident from an identification of the themes and ambiguities arising in these extracts. These themes include: first, native title law's assumption of the pre-formed individual subject, normative system and culture (the premise that native title is not a creature of the common law but of Aboriginal traditional law); secondly, and conversely, the reality of constituted, dialogic and incoherent identity and culture; thirdly, the discongruity between Aboriginal law and common law rights, and; finally, the selectivity and partiality of recognition.

Elizabeth Povinelli's book, *The Cunning of Recognition*, is an anthropological analysis of the application of liberal multiculturalism to Australian indigenous peoples, with several chapters devoted to an analysis of the native title claims

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[4] Michael Dodson, "Land Rights and Social Justice", in Galarrwuy Yunupingu ed., *Our Land is Our Life: Land Rights – Past, Present and Future* (St Lucia and Portland: University of Queensland Press, 1997) at 44. [Michael Dodson, "Land Rights"]

process. Povinelli lived with the Belyuen people, the aboriginal community at the centre of her analysis, for 17 years and was then the senior anthropologist for the Belyuen Aboriginal land claim.[5] Her book is the only text entirely devoted to a critical examination of multicultural recognition discourse and aboriginal social life. At this point further introduction is unnecessary, but I will refer frequently to Povinelli's work throughout this thesis.

What's 'native title law' got to do with it?

As a preliminary note, it seems necessary to explain my focus on native title law as a site of recognition discourse. Why look to judgments as discursive sites? What insights can judgments provide into the constituting effect of native title law? How might judgments shed light either into the reality of indigenous subject orientation towards the law or the phenomenon of sedimentation, in which the discourse of law and rights filters down to be absorbed by, appropriated by, or to form indigenous subjects? What is significant about legal discursive constructions of identity that deserve our attention more than other discursive sites at national and local levels? Is it law's coercive power or 'disciplinary side'? Is it its authority as a site for the production of meaning? Is it the desire within indigenous subjects for its recognition? And, if the latter, does this desire exceed the desire for recognition in non-legal discursive zones, like media and parliament? Why do some indigenous claimants wait 'all their lives' for state recognition in the form of a 'precious piece of paper which tells that the Australian Government recognizes their ownership'?[6] What makes this recognition 'precious'?

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[5] That claim was brought under the *Aboriginal Land Rights (Northern Territory) Act, 1976* rather than the *Native Title Act 1993* (Cth), but nothing turns on this for the purposes of this analysis.

[6] Galarrwuy Yunupingu, "From the Bark Petition to Native Title", in Galarrwuy Yunupingu, ed., *Our Land is Our Life: Land Rights – Past, Present and Future* (St Lucia and Portland: University of Queensland Press, 1997) at 10. Note that the author is here discussing the *Aboriginal Land Rights (Northern Territory) Act, 1976* but the same phenomenon of desiring and waiting can be observed in relation to the *Native Title Act 1993* (Cth). One might change 'ownership' to 'entitlement' in this context though, to highlight the differences between the rights that follow from recognition under each of the Acts.

As indicated above, a survey of the literature shows that the idea of native title law as 'recognition space' is one that has been canvassed occasionally but generally under-theorized.[7] This is despite the fact that the native title claims process is the primary legal and political forum for the articulation and 'recognition' of Aboriginal identity in Australia and feeds and fuels public debate about indigenous identity, entitlement and national shame. For this reason, the native title claims process is an important and authoritative site for the construction and performance of Aboriginal identity. Paradoxically, the *authority* of native title recognition derives from its emanation from the State, its *necessity* from historical acts of state oppression and its *limits* from the deficits of liberal multicultural theories of recognition.

The focus in this thesis on native title legislation and case law may therefore be justified on the premise that law is a major contributor to the social process of recognition.[8] This is explained by the fact that:

> ... (l)egal and human rights are the institutional tokens of our identity, important weapons in our struggle for recognition. Recognition helps establish interpersonal bonds and builds individuality through sociality; rights are bargaining chips in our negotiations of identity.[9]

In addition to law's role in adjudicating struggles for recognition, it is also powerfully symbolic. This power is a central theme in this thesis and exposes

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[7] A notable exception is Povinelli's, *The Cunning of Recognition,* in which she describes legal multiculturalism in the following terms: 'The juridical struggle to formulate a legally valid multicultural form of common law provides a particularly important perspective on late liberal forms of power. Legal decisions bring into sharp relief the disjunction between ideologies of recognition and the practices and pragmatics of the distribution of rights, materials, and institutions. In the first place, law is one of the primary sites through which liberal forms of recognition develop their disciplinary sides as they work the hopes, pride, optimisms, and shame of indigenous and other minority subjects. The law is a significant site where local languages are diverted into judicial languages, atrophying imaginations of alternative forms of collective action.' *Supra* note 1 at 184.

[8] Costas Douzinas, "Identity, Recognition, Rights or What Can Hegel Teach Us About Human Rights?'" (2002) 29(3) Journal of Law and Society 379 at 386.

[9] *Ibid.*at 386.

some of the fallacies of liberal recognition discourse. Sally Engle Merry describes the role of law in the following terms:

> ... law plays a critical cultural role in defining meanings and relationships, but it does so in the context of state power and violence. The power of law to transform sociocultural systems is two-sided: it depends both on the direct imposition of sanctions and on the production of cultural meanings in an authoritative arena.[10]

In the argument that follows, I have adopted Merry's understanding of law as culturally powerful, productive, and an instrument of state power. I should also at this point signal that Merry's understanding of the 'transformative' effect of law is complicated by her exploration of the capacity of the subject to creatively resist and appropriate its terms, such as to be an agent in its transformation. She does not assume law's instrumental effect, but rather, sees its effects as complicated and sometimes unforeseen. As participants in the legal process, I am interested in how indigenous claimants engage with law's demands and are, in turn, affected or effected by their engagement.[11] Debate about the capacity of the subject to resist law's power, or use it as a tool in political struggle, is explored in Chapter Four.

Law's transformative power in the native title arena relies not only on sanctions but on its power to reward by distributing public goods, for example, in the act of finding that native title rights exist. This is related to its power to sanction, which I also see at work in native title cases in law's declaration that an individual or community is insufficiently 'Aboriginal', meaning 'traditional'. Sanction also comes in the re-legitimation of colonial dispossession through the court's

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[10] Sally Engle Merry, *Colonizing Hawaii: The Cultural Power of Law* (Princeton, New Jersey: Princeton University Press, 2000) at 17. [Merry, *Colonizing Hawaii*]

[11] There has been little research conducted within law or anthropology as to the effects of the native title claims process. Elizabeth Povinelli's book, *The Cunning of Recognition* is distinct in this respect. See *supra* note 1. It should also be noted that a recent conference was held at the Australian National University on this subject, see: 'The Effects of Native Title' Workshop, Old Canberra House, The Australian National University, Canberra, November 1-2, 2005. Workshop papers should be published later this year but are not available at the time of writing.

rejection of a native title claim, in the hollow feeling of defeat in finding oneself undeserving of law's 'recognition' or undesired by the State. Law imposes an 'onerous burden' on Aboriginal subjects in order to reclaim country: 'we have to jump through hoops, we have to recall the stories and to demonstrate the cultural components that relate to the law that relates to the land.'[12] Law's sanction for those who fail to meet the threshold of 'authenticity' comes in the sense that the 'failure' of one's cultural identity is a personal failure, that the more pertinent question is not, 'were my traditions taken from me?', but, 'did I, my parents, and my children abandon them?'[13] It is further manifest in the pervasive 'sense of deficient knowledge', the inability to 'fill in the gaps' of a disrupted family and cultural history which may be felt as 'lack and 'embarrassment' rather than the focus of complaint'.[14]

The question, 'why look to native title cases as evidence of the constituting *effects* of native title?' is somewhat more difficult to answer. As Merry notes, '(c)ourt records provide a special lens on everyday life, but they are mediated by the language of the law and the perspectives of their writers'.[15] They can therefore provide only limited, mediated insights into indigenous experience of the process. Even transcripts might offer a more valuable resource, at least in the study of how indigenous witnesses articulate their claims, how they 'perform' Aboriginality in the court setting or 'play the native'.[16] However, my interest in native title judgments is not in their authority as legal texts, but as discursive sites

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[12] Patrick Dodson, "Reconciliation in Crisis" in Galarrwuy Yunupingu, ed., *Our Land is Our Life: Land Rights – Past, Present and Future* (St Lucia and Portland: University of Queensland Press, 1997) at 137. [Patrick Dodson, "Reconciliation"] Again, in this case, Patrick Dodson is referring to the Northern Territory land claims process, but the process of 'jumping through hoops' is arguably even greater under the *Native Title Act (1993)* (Cth).

[13] Povinelli, *supra* note 1 at 54.

[14] Gillian Cowlishaw, *Blackfellas, Whitefellas, and the Hidden Injuries of Race* (Malden, MA and Oxford: Blackwell Publishing, 2004) at 210.

[15] Merry, *Colonising Hawaii, supra* note 10 at 9.

[16] Ben Golder, "Law, History, Colonialism: An Orientalist Reading of Australian Native Title Law", (2004) Deakin Law Review 2.

and cultural artefacts. I explore the productive discursivity of law, the way it constitutes those subjects it describes, defining the terms on which future claims must be framed and will be determined. My interest is in the discourse and language of law, which simultaneously serves as a 'strategy for resistance' and a 'tool of oppression',[17] both identity effacing and constructing. However, in Chapter Four I seek a way beyond the paralysis of these paradoxes in the idea performativity and the 'cunning' of recognition discourse.

[17] Susan Staiger Gooding, "Place, Race and Names: Layered Identities in United States v. Oregan, Confederated Tribes of the Colville Reservation, Plaintiff-Intervenor" (1994) 28(5) Law and Society Review, Symposium: Community and Identity in Sociolegal Studies 1181-1230 at 1182.

Chapter One: Theories of multicultural recognition and 'recognition' discourse in Australian native title case law.

The Australian federal government defines Australia as a 'multicultural' society. Aboriginal 'culture' receives its recognition within this broader policy of multiculturalism, but also retains a special place in the nation's imaginary as the culture of its First People. Native title law is one important frontier in the recognition of indigenous culture, defined in terms of tradition. The word 'recognition' is ambiguously infused within legislative and judicial discourse in native title law. Its use varies from the formal 'recognition' by one legal system of the continuing existence of another, to a statement of symbolic 'recognition' of the continuing vitality of indigenous identity and entitlement to land in particular cases. In its richest symbolic form, the word is linked to historical dispossession, national shame and the reconciliation process. In this Chapter, I provide an overview of multicultural theories of recognition in order to situate native title recognition discourse in its political, theoretical and discursive context. I use multicultural recognition theory to explore what is denoted by the term and 'act' of 'recognition' in native title cases. I then explore the ambiguous slippage between the language of formal legalism, abstraction, particularism, rights, identity, social justice and reconciliation within the discourse of, and about, native title, to critique legal recognition discourse and highlight its limits, internal contradictions and chameleon character.

An overview of multicultural theories of recognition.

The customary, though difficult, starting point in a discussion of theories of 'recognition' is Hegel's explication of the term in *The Philosophy of Right.*[18] In Hegel's view, individual identity is formed dialectically in interaction with others. The self is constructed 'reflexively' and is in a relationship of 'radical dependence'. Law and the State have an important role to play in bestowing

[18] G. W. Hegel, *The Philosophy of Right,* trans. with notes by T.M. Knox (Oxford: Clarendon Press, 1957).

recognition on subjects. Adopting Hegel's concept of dialogically formed identity, a starting premise in Charles Taylor's theory is the notion that recognition is a 'vital human need'.[19] His multicultural theory of 'recognition' has been influential on both liberal and non-liberal identity and multicultural theorists. Misrecognition, he argues, can inflict harm, acting as a 'form of oppression, imprisoning someone in a false, distorted, and reduced mode of being.'[20] Taylor's theory of recognition starts by presuming the equal worth of all cultures before then subjecting them to comparative evaluation. His is a communitarian response to liberalism, which concerns itself with the conflict between multiculturalism and universalism.[21] He proposes that the culture of authenticity requires equal opportunities for all to develop their own identity and requires the universal recognition of difference.[22]

Taylor develops the concepts of 'recognition' and 'authenticity', two concepts that are central to contemporary multicultural discourses of recognition. In his view, the recognition of cultural particularity is necessary so that the individual may live *authentically.* This contrasts to the notion of 'dignity', which merely requires *universal* equal respect and manifests in citizenship rights. My use of the term 'authenticity' throughout this thesis differs in some respects from Taylor's use of the term, though is related to it. In the difference lies a critique of Taylor's approach. Let me explain. Taylor suggests that the individual needs his or her particular culture to be recognized as legitimate and valuable, such that they are able to live authentically, by reference to their culture. In this thesis, the word 'authentic' marks a *demand* that native title law makes of the claimants before it. The 'authentic' Aborigine, according to law, complies with an identity script of

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[19] Charles Taylor, *Multiculturalism and "The Politics of Recognition"* (Princeton: Princeton University Press, 1992) at 25. [Taylor, *Multiculturalism*]

[20] *Ibid.* at 25.

[21] This compares to the concern with the politics of redistribution with which some of his critics are engaged. See, for example, Nancy Fraser, discussed below.

[22] Charles Taylor, *The Ethics of Authenticity* (Cambridge and London: Harvard University Press, 1992) at 50. [Taylor, *Ethics*]

traditional culture, such that hybrid, fluid, ambivalent indigenous bodies are deemed 'inauthentic'. In my view, a belief in the individual's *need* to live authentically, understood by reference to a coherent culture, has been translated in recognition discourse into a *demand* that claimants manifest a particular type of indigeneity against which their authenticity is measured. That is, a sense of cultural authenticity has been grafted onto a sense of individual authenticity.[23] This is related to the idea in multicultural theory that culture provides a context of choice, a 'horizon of significance' for the individual subject, which brings us to the work of Kymlicka.[24] Kymlicka's contribution to recognition discourse is premised on the relationship between culture and individual identity.[25] He argues that for the individual to have a meaningful 'context of choice' in which to make decisions about the good life, he/she needs a 'rich and secure cultural structure'. Therefore, liberal states should facilitate the preservation of minority groups, requiring 'recognition' but potentially also other positive policy initiatives. This has led critics to conclude that Kymlicka implicitly defines 'culture' in a homogenous and bounded way, though purporting to seek protection of the structure, not the content, of minority cultures.

In *The Struggle for Recognition*, Axel Honneth sets out to explore and justify contemporary struggles for recognition by marginalized and subaltern groups. He emphasizes the (immediate) intersubjective nature of recognition. Further, his emphasis is on the psychological need for recognition, rather than recognition as

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[23] For a discussion of the relationship between cultural and individual authenticity, see Mark Evans, "'Authenticity' in the jargon on multiculturalism" in Bruce Haddock and Peter Sutch, eds., *Multiculturalism, Identity and Rights* (London and New York: Routledge, 2003).

[24] *Ibid.* at 66.

[25] I derive the following overview from my reading of Will Kymlicka, "The Value of Cultural Membership" in Will Kymlicka, *Liberalism, Community and Culture* (Oxford: OUP, 1989).

a principle of universal justice.[26] Drawing on Hegel, Honneth identifies three different relationships of mutual recognition in family, law and state recognition:

> [I]n 'the affective relationship of recognition found in the family, human individuals are recognised as concrete creatures of need; in the cognitive-formal relationship of recognition found in law, they are recognised as abstract legal persons; and, finally, in the emotionally enlightened relationship of recognition found in the State, they are recognised as concrete universals, that is, as subjects who are socialised in their particularity.[27]

The third form of recognition, which involves a positive relationship of recognition, is most relevant in the native title context and is associated with the politics of difference, identity and multiculturalism. The failure of state recognition manifests in a particular form of 'disrespect' that 'entails negative consequences for the social value of individuals and groups.'[28]

At this point I should signal that there are a number of variants of multicultural theory which have adopted some concept of recognition. These have been described as including 'conservative', 'liberal', 'left-liberal' and 'critical-resistance' multiculturalisms.[29] On this classification, 'conservative multiculturalists' claim to recognize the formal equality of all cultures, but nonetheless take a 'survival of the fittest' approach to their continuing existence in the State. They therefore do not interrogate the dominant societal culture, and have an assimilationist quality. This is not the form of multiculturalism that dominates the discourse of

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[26] Compare to the work of Nancy Fraser, discussed below. This distinction is described by Scott Lash and Mike Featherstone, "Recognition and Difference: Politics, Identity, Multiculture" in Scott Lash and Mike Featherstone, eds., *Recognition and Difference* (London: SAGE Publications Ltd, 2002) at 4.

[27] Axel Honneth, *The Struggle for Recognition: The Moral Grammar of Social Conflicts*, trans. by Joel Anderson (Cambridge: Polity Press, 1995) at 25. [Honneth, *The Struggle for Recognition*]. Emphasis added.

[28] *Ibid.* at 134.

[29] I derive this classification and the discussion that follows from Peter McLaren, "White Terror and Oppositional Agency: Towards a Critical Multiculturalism" in David Theo Goldberg, ed., *Multiculturalism: A Critical Reader* (Cambridge, USA and Oxford: Blackwell Publishers, 1994).

recognition in liberal multicultural societies, although there has been a recent shift towards this model in Australia, as will be discussed below. 'Liberal multiculturalists', by contrast, assume racial and cultural equality, and seek to realize relative social equality through reform of existing 'cultural, social and economic constraints'. 'Left-liberal multiculturalists' emphasize not the equality of the races, but the importance of cultural difference and its recognition. 'Difference' is seen to be a product of culture, and is thereby abstracted from social and economic inequalities. It is a matter of Self and Other, not of 'flux, movement, becoming and indeterminacy'.[30] 'Difference' is also generally sketched in essentialist terms, compliance with an 'identity script' necessary before a recognition dialogue with the State can begin.

My own approach might roughly fall under the rubric of 'critical and resistance multiculturalism', characterized by a transformative political agenda, a poststructuralist approach to signification, meaning and identity, a re-conceptualisation of culture as incoherent and fluid, an emphasis on difference within rather than between, a consciousness of the constitutive power of discourse and an understanding of agency deriving from a 'new *mestizaje* consciousness'.[31] On this approach, subjectivity is understood as 'multiple, dynamic and continuously produced' or discursive.[32] From this perspective, 'differences are produced according to the ideological production and reception of cultural signs.'[33] I use the expression 'multicultural recognition discourse' throughout the thesis to denote the 'left-liberal' form, most common in contemporary liberal democracies. However, the political and legal expression of

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[30] Lash and Featherstone, *supra* note 26 at 8.

[31] Defined by Peter McLaren as 'not simply a doctrine of identity based on cultural bricolage or a form of bric-a-brac subjectivity but a critical practice of cultural negotiation and translation that attempts to transcend the contradictions of Western dualistic thinking.' McLaren, *supra* note 29 at 67.

[32] Amina Mama, *Beyond the Masks: Race, Gender and Subjectivity* (London, New York: Routledge, 1995) at 2.

[33] McLaren, *supra* note 29 at 57.

the discourse possesses a slippery quality, morphing at times into liberal and conservative forms.

Identity rights movements have been premised on left-liberal multicultural theories of recognition, in particular, on the idea that recognition of difference is a vital human need. They rely on the twin premises of cultural difference and core cultural identity, the content of which is amenable to description and codification. They advance claims for the State's recognition of a raced, gendered or cultured subject in stasis. Even if not an explicit objective, in seeking legal *status,* identity rights claims inevitably secure its by-product, *stasis*. Their cultural preservation political objective is explained as a response to the politics of assimilation and national cultural homogeneity.[34] In that political climate, the assertion of cultural difference and resistance seemed to be emancipatory claims. However, what has curiously resulted from the politics of cultural preservation and reification is a convergence of strange bedfellows, between conservatives, fearing the instability of cultural hybridity, and progressives, seeing in cultural purity and preservation the potential to resist assimilation.[35] Identity politics movements have also been considered to be a 'reaction ... to an ensemble of distinctly postmodern assaults upon the integrity of modernist communities producing collective identity'.[36] That is, these movements might be thought to be responses to the particular form of 'disorientation' attributed to postmodernism, through which the subject has lost its ability to position itself. 'Identity politics permits a sense of situation', defined not temporally or spatially, as in Marxian analysis, but, by reference to a group

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[34] Richard Ford, "Beyond 'Difference': A Reluctant Critique of Legal Identity Politics" in Wendy Brown and Janet Halley, eds., *Left Legalism/ Left Critique* (Durham and London: Duke University Press, 2002) at 42.

[35] Seyla Benhabib, *The Claims of Culture: Equality and Diversity in the Global Era* (Princeton, N.J. and Oxford: Princeton University Press, 2002) at 4.

[36] Wendy Brown, *States of Injury: Power and Freedom in Late Modernity* (Princeton: Princeton University Press, 1995) at 35. [Brown, *States of Injury*]

identity. [37] In multicultural discourse, this identity is defined by reference to 'culture'.

The Australian Government's Multicultural Policy

In light of the terrorist attacks in the United States and Bali, the Howard Government released a new multiculturalism policy document in 2003. This document affirms the shift from the previous emphasis on 'diversity' to a new emphasis on 'unity' and 'community harmony'.[38] The Australian indigenous population finds its place in the document in the acknowledgement of its unique 'contribution' to Australia, along with an acknowledgment of the 'contributions' of Australia's 'early settlers' and 'recent migrants'. 'Australian multiculturalism' is said to 'embrace' the heritage of Indigenous Australians, along with that of "early European settlement, our Australian-grown customs and those of the diverse range of migrants now coming to this country".

The concept of 'recognition' appears rarely throughout the policy document, surprising given the centrality of the concept to theories of multiculturalism. Its primary use is in the statement that 'Australian multiculturalism recognizes, accepts, respects and celebrates cultural diversity'. The notion of 'respect' appears more frequently, the policy providing under 'respect for each person' that 'subject to the law, all Australians have the right to express their own culture and beliefs and have a reciprocal obligation to respect the rights of others to do the same'.[39] Thus, the language is, interestingly, less of recognition, than of respect and responsibility. It is a significant shift from the multiculturalism of Keating's

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[37] *Ibid.* at 35.

[38] Austl., Commonwealth, Department of Immigration and Multicultural Affairs, *Multicultural Australia: United in Diversity: Updating the 1999 New Agenda for Multicultural Australia: Strategic Directions for 2003-2006,* online: Department of Immigration and Multicultural Affairs <http://www.immi.gov.au/living-in-australia/a-diverse-australia/government-policy/australians-together/current-policy/index.htm>.

[39] Emphasis added.

Labor Government. It is also at odds with the left-legal recognition discourse contained in native title legislation and case law. These 'official artefacts' emphasize the need for recognition of cultural particularity, are framed in the form of 'rights' to land and are situated within a context of contemporary reconciliation. They do not engage in the language of recipricocity or responsibility. Further, they emphasize difference rather than national or social 'unity'. Native title law's only invocation of a concept of 'unity' is in the defined limits of native title recognition, where particular traditional laws and customs will not be recognized where incompatible with the common law. That is, aspects of indigenous traditional law that pose a threat to the unity or integrity of the common law are excluded.

Therefore, the relationship between indigenous identity and multicultural recognition discourse in contemporary Australia is complex and ambiguous. Current Australian Government multicultural policy does not formally engage in the discourse of recognition. Although indigenous populations are included under the rubric of 'cultural diversity', which is generally 'recognized' as a contemporary social reality, there is no talk of the recognition of cultural particularity which might correspond with Hegel's third form of state recognition. However, the separate treatment of traditional indigenous identity (as a facet of multicultural policy) and indigenous social and economic disadvantage (as a facet of welfare policy) reflects the more general disaggregation of recognition and redistribution in liberal multicultural discourse. Further, the emphasis in Federal Government policy documents on indigenous 'heritage' emphasizes the traditional 'high' culture of the Australian indigenous population, saying nothing about contemporary indigenous identity and social life, let alone the 'contribution' this makes to Australian society.[40]

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[40] More generally, the lumping together of all racial and cultural groups into a 'multiculturalism' policy negates important differences in the social and economic status of each group, as well as between the individuals within them. This is especially highlighted with respect to the Australian indigenous population, whose social and economic status is the consequence of factors specific to this population and their place in Australia's history.

By contrast, left-liberal recognition discourse figures prominently in native title case law and legislation. It might be suggested that this reflects its origins in a more progressive epoch in Australia's multicultural policy and legal history. It is because of its centrality to native title law, and its relationship to left-liberal forms of multiculturalism, that I have positioned my analyses of recognition discourse within this context, rather than within the context of the conservative multiculturalism that currently defines Australian Government policy under the Howard Government.

Native title law as 'recognition space'?

The High Court's decision in *Mabo v Queensland* [*'Mabo'*] 'recognized' the existence of native title, said to have survived British colonization and to have continued to exist where not extinguished by an inconsistent act.[41] This case marked a departure from the prior maintenance of the 'deforming fallacy' of *terra nullius*.[42] The majority of the Court stated that:

> [T]he common law of this country *recognizes* a form of native title which, in the cases where it has not been extinguished, reflects the entitlement of the indigenous inhabitants, in accordance with their laws or customs, to their traditional lands....[43]

In clarifying that no new rights were being created, the Court emphasized the act of recognition: what had not been recognized before would now be recognized. The 'unjust' and 'discriminatory' doctrine of *terra nullius* could no longer be maintained, 'whatever the justification advanced in earlier days for refusing to

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[41] *Mabo and Others v Queensland (No. 2)* (1992) 175 CLR 1; (1992) 107 ALR 1; (1992) 66 ALJR 408; (1992) EOC 92-443; [1992] HCA 23. [*Mabo* cited to CLR]

[42] William Deane, "Preface" in Galarrwuy Yunupingu, ed., *Our Land is Our Life: Land Rights – Past, Present and Future* (St Lucia and Portland: University of Queensland Press, 1997) at x.

[43] *Mabo, supra* note 41 at 2. Emphasis added.

recognize the rights and interests in land of the indigenous inhabitants of settled colonies'.[44]

The Commonwealth Government responded to the *Mabo* decision by enacting the *Native Title Act 1993* ('the Act'), which reflected the principles elaborated in the *Mabo* decision, principally by reference to the judgment of Brennan J. Section 4(1) of the Act provides that '(t)his Act recognizes and protects native title'.[45] The preamble to the Act, indicating its responsiveness to Mabo, states:

> The High Court has:
>
> (a) rejected the doctrine that Australia was *terra nullius* (land belonging to no-one) at the time of European settlement; and
>
> (b) held that the common law of Australia recognises a form of native title that reflects the entitlement of the indigenous inhabitants of Australia, in accordance with their laws and customs, to their traditional lands.[46]

The use of the term 'recognition' in the preamble accords with its previous use in the *Mabo* decision. However, it is followed by a more substantive declaration of legislative purpose, which states that 'the people of Australia intend', not only to 'rectify the consequences of past injustices by the special measures contained in this Act', but also:

> ... to ensure that Aboriginal peoples and Torres Strait Islanders receive the full *recognition* and *status* within the Australian nation to which history, their prior rights and interests, and their rich and diverse *culture*, fully entitle them to aspire.[47]

This more clearly reflects a multicultural discourse of recognition, emphasizing particularity as a basis of entitlement. The Preamble then states that the Act 'is

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[44] *Mabo, supra* note 41 at 42.

[45] See also section 3(a) and section 10.

[46] Emphasis added.

[47] Emphasis added.

intended to further advance the process of reconciliation among all Australians.' Kirby J refers to this statement in *Western Australia v Ward* [*'Ward'*] as requiring the '*full* recognition of the rich culture of Aboriginal peoples and the acceptance of the "unique" character of native title right'.[48]

Since the invocation of multicultural recognition discourse in the preamble, subsequent judicial discussions of the term 'recognition' express confusion and ambiguity. Indeed, in *Ward*, a majority of the Court conceded that, '(t)o date, the case law does not purport to provide a comprehensive understanding of what is involved in the notion of "recognition".'[49] Nonetheless, the Court goes on to tentatively explore the meaning of the word by reference to its limits. In the same case, Kirby J, also remarking upon the ambiguity of the term 'recognition' and its derivation from the common law, outlined a set of principles to guide the interpretation and application of the concept:

> First, it should observe the principle that, in the case of any ambiguity, the interpretation of the statutory text should be preferred that upholds fundamental human rights rather than one that denies those rights recognition and enforcement. Secondly, so far as is possible, it should take into account relevant analogous developments of the common law in other societies facing similar legal problems. Thirdly, a clear and plain purpose is required for a statute to extinguish property rights, particularly where the legislation purports to do so without compensation.[50]

Callinan J adverts to the fraught concept of 'recognition' as derived from *Mabo,* stating that:

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[48] *Western Australia v Ward* (2002) 213 CLR 1; (2002) 191 ALR 1; (2002) 76 ALJR 1098; (2002) 23(13) Leg Rep 2; [2002] ANZ ConvR 446; [2002] HCA 28 at para. 581. Indeed, the Act was intended to be a special measure for the advancement of Aboriginal and Torres Strait Islander peoples under Article 1(4) of the *Convention on the Elimination of Racial Discrimination* and the *Racial Discrimination Act 1975* (Cth). See Melissa Perry & Stephen Lloyd, *Australian Native Title Law* (Sydney: Lawbook Co., 2003) at [AA1.10.]

[49] *Ward, supra* note 48 at para. 20.

[50] *Ibid.* at para. 567.

> Mabo [No 2] was a brave judicial attempt to redress the wrongs of dispossession. But its "recognition" of native title has involved the courts in categorising and charting the bounds of something that, being *sui generis*, really has no parallel in the common law. The Court has endeavoured to find a way of recognising, and to a degree protecting, that anomalous interest without unduly disturbing the law of Australian property. The results of this enterprise can hardly be described as satisfactory.[51]

Kirby J has stated that 'recognition' under the common law does not affect Aboriginal law, which 'operates separately, regardless of any recognition or extinguishment by the [the Act] or any other legislative regime'.[52] In this he seems to be paying tribute to the strength and resilience of indigenous law and custom, a mark of his respect for indigenous traditions and culture, their autonomy and integrity. He therefore appears, at least strategically, to accept the fallacy of the coherent normative and cultural system. For Kirby J, the difference between his approach and that of the majority lies not in differing notions of cultural boundedness, but in a holistic rather than fragmented approach to the recognition of native title rights and interests. Kirby J rejects the majority's approach, derived from the conceptualization of native title as a 'bundle of rights and interests', which arrives at a list of activities and uses 'recognized' as 'native title rights and interests'. He uses the examples of resources and cultural knowledge to demonstrate the differences between his dissenting approach and that of the majority of the Court, highlighting the dangers of itemizing rights and interests and removing the beneficial operation of the Act by abstracting them from context.[53] In the context of recognition discourse, one wonders what the dangerous or damaging effects of Kirby J's respectful assumption of the integrity and autonomy of indigenous custom might be. This thesis explores what demands this categorisation, as the basis for a legal expectation, makes of indigenous claimants as a criterion for authenticity. Native title law's demands are

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[51] *Ibid.* at para. 969. References omitted.

[52] *Ibid.* at para. 568.

[53] *Ibid.* at para. 471.

identified and critiqued in Chapter Three in light of claimant engagement with their terms.

To recapitulate, the language of recognition in native title case law and legislation is intended to denote that the common law does not create native title, but merely acknowledges that which already exists. This implies as a premise the existence of a discrete and coherent indigenous legal system and hermetically sealed culture; a conception of law that has been challenged by radical pluralism and poststructuralism and a conception of culture which has been surpassed in contemporary anthropology by notions of 'cultural production' and 'reproduction', interactivity and dialogue. It also implies both that indigenous law exists separately from common law, which is defined by its terms, but also that common law, the court 'forum' and 'process' have no place within indigenous law.[54] The language of intersection exists uneasily with the language of mutual exclusivity.

Conceptualizing native title recognition: as limit, translation or intersection?

In addition to sketching the terms on which native title could be recognized by the common law, the *Mabo* Court also indicated the moral and legal limits of its 'recognition':

> [R]ecognition by our common law of the rights and interests in land of the indigenous inhabitants of a settled colony would be precluded if the recognition were to fracture a skeletal principle of our legal system.[55]

The Court later articulated this 'inconsistency' test in the following terms:

> [T]hough the rejection of the notion of *terra nullius* clears away the fictional impediment to the recognition of indigenous rights and interests in colonial land, it would be impossible for the common law to recognise such rights

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[54] Kirsten Anker, "Indigenous Law as Fact: exploring the paradox of legal pluralism in Australia." Paper presented at McGill Faculty of Law, 16 Jan 2006 (unpublished).

[55] *Mabo, supra* note 41 at 43. Emphasis added.

and interests if the basic doctrines of the common law are inconsistent with their recognition.[56]

This 'inconsistency' test is implied, but not explicitly stated, in the requirement of common law recognition contained in section 223(1)(c). Here, the term 'recognition' denotes a limitation. Section 223 defines 'native title' as follows:

> Common law rights and interests
>
> (1) The expression native title or native title rights and interests means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:
>
> (a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and
>
> (b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and
>
> (c) the rights and interests are *recognised* by the common law of Australia.[57]

The definition of native title rights and interests by reference to indigenous customary law suggests that the Court is engaged in a form of recognition by 'translation' of one normative system into a form recognizable by another.[58] However, therein lies the potential for, indeed inevitability of, misrecognition. The act of translation requires the moulding of an amorphous body of ancient traditions and contemporary practices[59] into a coherent and bounded 'system'. Further, the 'spiritual' or 'religious' must be translated into the 'legal'. This 'requires the fragmentation of an integrated view of the ordering of affairs into

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[56] *Ibid.* at 46. Emphasis added.

[57] Emphasis added.

[58] Anker, *supra* note 54 at 2.

[59] And everything that is neither and both - I am not positing a clear distinction between these categories, that being one of my critiques of native title law. That is, I challenge the assumption that the 'traditional' and the 'contemporary' are clearly demarcated and mutually exclusive.

rights and interests which are considered apart from the duties and obligations which go with them.'[60] It requires the deletion of aspects of indigenous practice that might be thought to be repugnant to the common law system. It also requires the deletion of 'counter-mappings' of group and spatial identities.

In its decision in *Members of the Yorta Yorta Aboriginal Community v Victoria* [*'Yorta Yorta'*] the High Court outlines the two senses in which the word 'recognition' in section 223(1) is used: firstly, as indicating a limit on recognition, to the exclusion of traditional laws or customs that are 'antithetical to fundamental tenets of the common law', and, secondly, as indicating the 'intersection' at sovereignty between two legal systems.[61]

The concept of 'intersection' was introduced in *Fejo v Northern Territory* [*'Fejo'*].[62] Six members of the Court stated:

> Native title has its origin in the traditional laws acknowledged and the customs observed by the indigenous people who possess the native title. Native title is neither an institution of the common law nor a form of common law tenure but it is *recognised* by the common law. There is, therefore, an *intersection* of traditional laws and customs with the common law. [63]

Quoting that passage in their judgment in *Yorta Yorta*, Gleeson, Gummow and Hayne JJ assert that in an application for a determination of native title, the 'intersection' must be located by reference to the section 223(1) definition. It is, they argue, necessary to identify what it is that 'intersects' with the common law:

> Is it a body of traditional law and custom as it existed at the time of sovereignty? Is it a body of law and custom as it exists today but which, in

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[60] *Ward, supra* note 48 at para. 14.

[61] *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422; (2002) 194 ALR 538; (2002) 77 ALJR 356; [2002] HCA 58 at para. 77. [*Yorta Yorta*]

[62] *Fejo v Northern Territory* (1998) 195 CLR 96; (1998) 156 ALR 721; (1998) 72 ALJR 1442; [1998] 15 Leg Rep 11; (1999) 4(1) AILR 36; [1998] HCA 58. [*Fejo* cited to CLR]

[63] *Ibid.* at 128. My emphasis.

> some way, is connected with a body of law and custom that existed at sovereignty? How, if at all, is account to be taken of the inescapable fact that since, and as a result of, European settlement, indigenous societies have seen very great change?[64]

In articulating the limits of recognition in *Yorta Yorta*, Gleeson, Gummow and Hayne JJ deny the continuing law making capacity of indigenous peoples, stating that although 'significant adaptations' in the laws and customs of a people could be countenanced by law where those were 'contemplated' by that traditional law and custom, there could be no 'parallel law-making system' after the acquisition of British sovereignty. This supports the conclusion 'that the only rights or interests in relation to land or waters, originating otherwise than in the new sovereign order, which will be recognized after the assertion of that new sovereignty are those that find their origin in pre-sovereignty law and custom'.[65]

The above discussion reveals that the conceptualizations of recognition as 'limit', 'translation' and 'intersection' exist simultaneously and uneasily in native title case law and commentary. This reflects the ambiguity surrounding 'recognition', but also signals the chameleon-like character of the discourse. This character, it will be argued, renders successful claimant engagement with the discourse (i.e. strategic engagement adducing material reward) difficult if not impossible.

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[64] *Yorta Yorta, supra* note 61 at para. 31.

[65] *Ibid.* at para. 44.

Chapter Two: Some critical responses to multicultural recognition discourse.

This Chapter sets out critical responses to the multicultural theories of recognition introduced in Chapter One. These critiques are based on one or more of the following objections to assumptions or effects of multicultural recognition discourse:

- the assumption of coherent individual, group and cultural identity;
- the judicialization of political struggle;
- the assumption of the pre-formed subject (the sociological constructivist critique);
- the assumption of the neutral recognizer;
- the assumption of the passive subject.

Rejecting the view that the subject is both passive and static before the law, postmodern, sociolegal, critical anthropological and legal pluralist theorists see the law as affective and/or effective, defining the scope for subject agency in the limits of law's constitutive power.

Challenges to the assumption of coherent individual, group and cultural identity: recognition as 'appropriation' or 'objectification'.

Identity politics has come under attack by poststructuralist critics for its reliance on essential identity categories. Its essentializing effects are identified as the stagnation of group self-definition through rigid descriptions of group identity, the reification of tradition and the imprisonment of a group or individual within a conception of how they should be (law never asks 'what they *want*' only 'who they *are*').[66] At the same time, and along similar axes of debate, orthodox

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[66] Wendy Brown, *States of Injury, supra* note 36 at 49. It might also be noted that law does not ask 'what they need', though, interestingly, this was to be a basis of land entitlement under the Northern Territory land rights legislation introduced into Parliament by the Whitlam Government before its dismissal in 1975. The subsequent Fraser Government removed this provision from the legislation. See Galarrwuy Yunupingu, *supra* note 6 at 7-8. Note that the framing of an issue as one of 'needs' is not unproblematic. Kostiner highlights three different models of activist approaches to the use of law, stating that although the 'instrumental schema' emphasizes needs and services, the 'political schema' sees this rhetoric as

anthropology has been challenged by critical anthropology, the former's concepts of cultural coherence and objective observance countered by the latter's conceptions of cultural incoherence and situated observance. This thesis traces the dynamics of both related debates, between proponents of identity politics and poststructuralist critics, and between orthodox and critical anthropology. Particular attention is paid to the anthropological debate due to the dependence of native title law on its constructions and the centrality of 'culture' to both anthropology and multiculturalism.

Identity politics is critiqued by its opponents for creating a 'script'[67] 'which identity bearers must heed'.[68] Seyla Benhabib, a liberal multicultural theorist, critiques the essentializing tendencies of identity/difference politics, arguing that it 'is afflicted by the paradox of wanting to preserve the purity of the impure, the immutability of the historical, and the fundamentalness of the contingent.'[69] She submits that 'the goal of any public policy for the preservation of cultures must be the empowerment of the members of cultural groups to appropriate, enrich and even subvert the terms of their cultures as they may decide.'[70] Indeed, from an anti-essentialist perspective, 'freedom' lies in the capacity of the subject to self-define or redefine and to reject, appropriate and subvert prescribed identity categories.

This argument is compellingly articulated by Wendy Brown, who coined the term 'zones of unfreedom' to describe the legal domain in which identity norms are regulated and enforced. Brown, a critical theorist, critiques the 'oppressiveness of

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victimizing rather than empowering minority groups. See Idit Kostiner "Evaluating Legality: Toward a Cultural Approach to the Study of Law and Social Change" (2003) 37(2) Law and Society Review 323 at 339.

[67] K. Anthony Appiah, "Identity, Authenticity, Survival: Multicultural Societies and Social Reproduction", in Amy Gutman, ed., *Multiculturalism* (Princeton: Princeton University Press, 1994).

[68] Janet Halley, "'Like Race' Arguments", in Butler, Guillory and Thomas, eds., *What's Left of Theory* (New York, London: Routledge, 2000) at 43. [Halley, " 'Like Race' Arguments"]

[69] Benhabib, *supra* note 35 at 11.

[70] *Ibid.* at 66. Emphasis added.

closure on identity' and the vulnerability of the definitively named subject to colonization and regulation.[71] On this view, multicultural recognition not only makes false assumptions, but is, in itself, a threat. Brown suggests alternative ways of understanding the significance of identity categories. She argues that an identity category can be conceived as a marker of power, a maker of subjects, an axis of subordination, without thereby converting it into a centre of 'selves' understood as foundational.[72]

In this way one might take account of Aboriginality as a significant determinate of social and economic disempowerment without requiring the materialization of 'Aboriginality' as a precondition of recognition. Brown's perspective is consistent with Nancy Fraser's proposed shift in the politics of recognition from the recognition of identity (identity politics) to the recognition of status.[73] Fraser seeks to reject essentialism and psychologization and re-link recognition discourse to social, economic and cultural power through the concept of 'participatory parity'. On this model, misrecognition means social subordination. In this way, Fraser's approach resembles that of Iris Marion Young, whose concept of 'relational difference' dissociates the notion of difference from the essentialism of identity politics by focussing on the 'social and interactive relation' between social groups and others.[74]

Fraser's broader thesis is that the politics of recognition and redistribution should not be conceived oppositionally, but as interdependent perspectives on, and

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[71] Brown, *States of Injury, supra* note 36 at 30.

[72] *Ibid.* at 40.

[73] My overview of Nancy Fraser's theory of justice is drawn from Nancy Fraser, "Recognition without Ethics?" in Scott Lash and Mike Featherstone, eds., *Recognition and Difference* (London: SAGE Publications Ltd, 2002) [Fraser, "Recognition without Ethics?"] and Nancy Fraser, *Justice Interruptus: Critical Reflections on the 'Postsocialist' Condition* (New York and London: Routledge, 1997) [Fraser, *Justice Interruptus*].

[74] Iris Marion Young, *Justice and the Politics of Difference* (Princeton: Princeton University Press, 1990) at 161.

dimensions of, justice.[75] Fraser's focus, like mine, is not on 'immediate intersubjective' recognition (as per Hegel and Honneth), but on recognition by public institutions.[76] Turning to native title, we might note law's demand that indigenous subjects comply with an identity script of cultural coherence and tradition.[77] What makes Fraser's insights particularly cogent with regard to native title law is that a native title claim represents both a claim for recognition and for redistribution, the latter contingent upon the former. I use 'redistribution' loosely here, to refer to the material rewards for a successful materialization as Aboriginal.[78]

A cornerstone of identity politics and multiculturalism is the concept of 'culture'. In multicultural discourse, considered here as one variant of identity politics, identity has come to be conflated with culture, such that '[c]ulture has become a ubiquitous synonym for identity, an identity marker and differentiator.'[79] Cultural difference is identified as responsible for oppression, in what has been termed the 'culturalization of racism'. [80] Further, 'culture' has been defined by reference to 'ancient tradition'.[81] In Australian multicultural recognition discourse (and native

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[75] Nancy Fraser, "Recognition without Ethics?", *supra* note 73 at 29.

[76] Lash and Featherstone, *supra* note 26 at 4.

[77] On this, the Australian approach is distinct from the Canadian approach, for which proof of Aboriginal title depends only on proof of continuous occupation, not on cultural continuity. See Darren Dick, "'Comprehending 'the genius of the common law' – Native Title in Australia and Canada compared post-Delgamuukw" [1999] Australian Journal of Human Rights 3 at 9. This compares to the test for aboriginal cultural rights, which must be demonstrated to be 'integral to a distinctive culture'.

[78] There are obviously alternative ways to characterize a native title claim, and the State's act in granting native title rights. 'Redistribution' should not be taken here to presuppose the validity of the initial 'acquisition' of rights over land by the State.

[79] Benhabib, *supra* note 35 at 1.

[80] Sherene Razack, "What is to be Gained by Looking White People in the Eye? Culture, Race, and Gender in Cases of Sexual Violence" (1994) 19(4) Signs: Journal of Women in Culture and Society 894 at 898.

[81] Sally Engle Merry, *Human Rights and Gender Violence: Translating International Law into Local Justice* (Chicago: University of Chicago Press, 2006) at 226 [Merry, *Human Rights*]. The notion of 'tradition' that figures in native title law is tied to the ancient past. I therefore use the word in this sense throughout the thesis, not in its critical reformulation as 'an extended argument about some specific subject

title law as a form thereof), 'the "high" culture among traditional people is highly valued, albeit only really appreciated by cultured whites and by some powerful institutions', like Courts.[82] This compares with 'low' culture, 'marked by violence and poverty' and unrecognized, 'even by its bearers'.[83] As a result, 'the assertion of an explicit Aboriginality is transgressive', unless 'marked and mediated by formal recognition'. It is acceptable only when summonsed to 'centre-stage and made to perform in public', for example, during land claims proceedings.[84]

Critics of identity politics (and orthodox anthropology) have assumed the task of redefining culture to admit hybridity[85], fluidity and dialogue. The critical redefinition of 'culture', developed by poststructuralist theories, has also been embraced by some contemporary multicultural and democratic theorists. James Tully, for example, suggests that societies might be better described as *intercultural* than *multicultural,* due to the contested, fluid and dynamic nature of cultures in contemporary society.[86] Benhabib adopts Hegel's dialectical model of identity formation to redefine culture. She defines cultures as 'constant creations, recreations, and negotiations of imaginary boundaries between 'we' and the 'other(s).'[87] In doing so, Benhabib exposes one of the paradoxes of orthodox liberal multicultural theories. These theories are premised on notions of dialectical

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matter': Alasdair MacIntyre, *After Virtue,* Second Edition (Notre Dame, Indiana: University of Notre Dame Press, 1984) at 222. This alternative conceptualisation informs my critique of the orthodox use of the term.

[82] Cowlishaw, *supra* note 14 at 221.

[83] *Ibid.* at 221.

[84] *Ibid.* at 87.

[85] 'Hybridity' is used in cultural studies to denote 'a wide register of multiple identity, cross-over, pick-'n'-mix, boundary-crossing experiences and styles, matching a world of growing migration and diaspora lives, intensive intercultural communication, everyday multiculturalism and erosion of boundaries.' See Nederveen Pieterse, "Hybridity, So What?: The Anti-hybridity Backlash and the Riddles of Recognition" in Scott Lash and Mike Featherstone, eds., *Recognition and Difference* (London: SAGE Publications Ltd, 2002) at 221.

[86] James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge: Cambridge University Press, 1995) at 11.

[87] Benhabib, *supra* note 35 at 8.

identity formation, hence the centrality of 'recognition' to this discourse. However, the discourse of difference demands, as a precondition for recognition, that individual and cultural identities cohere and exist as pre-formed and fixed. Benhabib attempts to render consistent a democratic multicultural theory of recognition by applying the dialectic theory of identity formation to the definition of culture. For the purposes of this thesis, I have adopted her definition of 'culture': 'complex human practices of signification and representation or organization and attribution', which are:

- internally riven by conflicting narratives ,
- constituted through contested practices, and;
- engaged in dialogues with other cultures, cross-cultural 'boundary crossing', 'blurring' and 'shifting'.[88]

Traditional anthropology is premised on a conception of the pre-formed subject, with a coherent cultural and individual identity. It generally treats 'culture' as existing, discrete and observable, while seeming un-self-conscious about its position of observance. This approach has now been surpassed by trends towards interpretive[89], self-reflexive and situated anthropology. Indeed, critical anthropologists have come to identify positivism as their 'adversary'.[90] This has occurred at the same time that indigenous advocates have seized upon the strategic value of concepts like 'boundedness' and 'tradition' to make claims about group identity and collective culture.[91] We can identify five grounds of

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[88] *Ibid.* at ix and vii. References omitted.

[89] Clifford Geertz, *Local Knowledge: Further Essays in Interpretive Anthropology* (New York: Basic Books, 1983) at 7.

[90] Julie Cruikshank, *The Social Life of Stories: Narrative and Knowledge in the Yukon Territory* (Vancouver: UBC Press, 1998) at 161.

[91] Jo-Anne Fiske, 'Positioning the legal subject and the anthropologist: The challenge of *Delgamuukw* to anthropological theory' (2000) 45 *Journal of Legal Pluralism* 1 at 4.

opposition to orthodox anthropology upon which 'new' (postmodern or critical) anthropology positions itself:

1. the comparative study of difference;
2. the premise of cohesive, self-consciously bounded cultural communities;
3. the practice of observation or descriptive 'normative' ethnographies;
4. the categorization of knowledge and practice as traditional;
5. the displacement of the unified subject of law and nation with the multiple or fractured subject of the postmodern era.[92]

'New' anthropology rejects orthodox approaches on the basis that they are 'discriminatory' and offensive to those indigenous subjects they claim to depict. This is related to the post-colonial critique of the discourse of the 'traditional', said to represent indigenous subjects as Other, inferior and barbaric. On this perspective, native title law is seen as a continuation of colonialism. In rejecting the myth of the neutral observer, critical anthropology instead argues that knowledge is partial, situated and constructed. Its focus is on 'language' and 'representation'.[93] Further, it emphasizes 'difference within'[94] rather than 'difference between', a rejection of the assumption that culture both assumes an uncomplicated totality and is *the* defining 'difference'.

Clifford Geertz, perhaps the most important pioneer of 'new' anthropology, shifts towards an understanding of the anthropologist as a situated observer engaged in social construction.[95] Geertz, who coined the label 'interpretive anthropology',

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[92] *Ibid.* at 4.

[93] *Ibid.* at 6.

[94] *Ibid.* at 6.

[95] He describes law as "constructive of social life not reflective [of it]". Geertz, *supra* note 89 at 218. Also see Gary A. Olson, "The Social Scientist as Author: Clifford Geertz on Ethnography and Social Construction" (1991) 11(2) JAC 245-268 in which he states that Geertz sees meaning as "socially, historically, and rhetorically constructed." In an extracted interview with Geertz, he asks the latter whether

suggested that cultural 'phenomenon' should be treated as 'significative systems posing expositive questions'.[96] His approach is characterized by the study of structures of meaning, 'webs of signification', where language is treated as a symbolic system.[97] Sally Engle Merry, a contemporary legal anthropologist, also adopts an open-textured conception of culture as 'hybrid and porous'.[98] She identifies two different ways in which culture is understood in human rights discourse: as 'tradition' and 'national essence'.[99] She compares each of these conceptions against the contemporary anthropological conception of culture as:

> ... unbounded, contested, and connected to relations of power, as the product of historical influences rather than evolutionary change, 'understood in context', not 'homogenous' or 'pure' but, rather, produced through hybridization or creolization.[100]

Merry offers some particular insights into the conceptualization of indigenous cultures, which she says are defined as 'traditional' in contra-distinction to globalisation. The word 'culture' is employed to describe the basis of 'national, religious or ethnic identities' and rural communities, wherein life is governed by 'fixed tradition'.[101] Therefore, just as critical race theorists deconstruct the concepts of 'raced' and 'unraced' in hegemonic discourses, so we can deconstruct a discourse of 'cultured' and 'non-cultured' (or civilized), the former lying 'out there', the latter, 'in here'.[102] Further, we can see that the native title common law and statutory reference to 'traditional laws and customs' abstracts

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he considers himself to be a 'social constructionist' to which Geertz (generally sceptical of labels) replies, "Yes, that one I'll buy." Online: JAC < http://jac.gsu.edu/jac/11.2/Articles/geertz.htm>.

[96] Geertz, *supra* note 89 at 3-4.

[97] *Ibid.* at 182.

[98] Merry, *Human Rights, supra* note 81 at 9.

[99] *Ibid.* at 13-14.

[100] *Ibid.* at 15.

[101] *Ibid.* at 10-11.

[102] *Ibid.* at 10-11, 13.

from race as a group identifier, a trend consistent with multicultural recognition discourse and with a more general social scientific "naïve no-race position".[103]

However, the 'incoherent cultures' critique has been challenged by some post-colonial and anthropological scholars who question its utility in indigenous rights struggles. Their opposition to postmodernism parallels that of critical race scholars, who argue that although human rights essentialism has an oppressive effect, its discourse nonetheless remains a (if not the most) powerful tool in emancipatory political struggle. The dilemma posed by postmodernism is very real for 'new' or critical anthropologists working as expert witnesses in native title claims. Critics see danger in their deconstructionist project for indigenous political movements and ask: if coherence is the only basis on which a successful native title claim can be asserted, how can the depiction of incoherence be constructive? The polar opposition assumed between coherence and incoherence is also challenged by the question: '(i)f coherence is an artifice of trope and rhetoric why is the opposite any less so? Why must communities be 'constructed' as either fully fragmented or seamlessly whole?'[104] It is alleged that the characterisation of indigenous communities in this oppositional way reflects our own 'postindustrial urban' anxieties imposed on the Other – an 'imposition of Western self-recognition onto the subject'.[105] Other criticisms levelled at 'new' ethnography include the pretension that the author is just one voice among many and the inaccessibility of the discourse as a result of the complex language used.[106]

In response to these critiques, I would suggest that the oppositional nature of the coherence/incoherence debate has arisen partly as a response to the

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[103] Faye Harrison, "Facing Racism and the Moral Responsibility of Human Rights Knowledge" (2000) 925 Ethics and Anthropology: 45-69 at 47.

[104] Fiske, *supra* note 91 at 7.

[105] *Ibid.* at 7-8.

[106] *Ibid.* at 7-8.

oppositional framing of various debates within recognition discourse. By way of example, one could cite the discourses of authenticity/fabrication, the organic/constructed, the oriented/disoriented or the traditional/corrupted. In these oppositions, recognition discourse (and native title law as an example thereof) admits no 'in-between'. Therefore, 'incoherence' has come to represent the 'in-between' in critiques of each of these dichotomies. Therefore, my adoption of postmodern critiques represents an attempt to seek a legitimate way out of the recurrent dichotomies in native title law and discourse which simultaneously efface and construct the subject.

Codifying identities: the judicialization of political struggle.

As an extension of the critique of coherent identity, identity politics has also come under attack by poststructuralist and leftist critics for effecting the judicialization or legalisation of political struggle. Although an intended response to 'misrecognition' and 'oppression', judicialization, it is argued, effects identity closure and requires the subject's participation in, and submission to, the very regimes of power that perpetuate social inequalities.[107] Thus, this critique situates identity closure within a context of power relations. There are two related critiques made by critics of judicialization. The first is that law sets limits on what the subject imagines to be political possibilities.[108] For CLS scholars, this is the method by which law functions to legitimate the existing social and economic order. In the context of Aboriginal land rights, this translates into radical Aboriginal voices not being able to 'bite the hand that feeds them', so to speak. Indeed, 'the overwhelming assertion of governments' good intentions and the funding of Aboriginal organisations meant it became difficult to retain the mantle of a just battle against unrecognized injustice'.[109] The second critique is that the

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[107] Benhabib, *supra* note 35 at 4.

[108] Robert Gordon, "Critical Legal Histories" (1984) *Stanford Law Review* 57 at 109-110.

[109] Cowlishaw, *supra* note 14 at 80.

judicialization of identity politics requires participation by the marginalized in contemporary orders of regulation, discipline, exploitation and domination.[110] This critique is the focus of this section.

Critics of judicialization suggest that certain political solutions 'codify and entrench' or 'mask' existing social relations rather than 'directly contest[ing] and transform[ing]' them. [111] In this vein, Wendy Brown submits that the participation of the marginalized in contemporary orders of identity regulation "redraw(s) the very configurations and effects of power they seek to vanquish'.[112] She argues that the articulation of 'difference' into the language of 'recognition' becomes the 'language of unfreedom' through individualization, normalization and regulation.[113] 'Freedom' lies in the potential of the subject to reposition and resignify itself. 'Unfreedom' thus lies in the act of definitive naming. Identity politics movements are treated sceptically, seen to sacrifice political freedom for legal protection.[114] This 'protection' takes the form of legal recognition. That is, identity rights claims 'impose a law of truth on [the subject] which he must *recognize* and which others have to *recognize* in him'.[115] Brown's argument is not only that the judicialization of identity rights claims essentializes identity, but also that by doing so, it fixes the *social position* of identity categories and 'codifies as well the meanings of their actions against all possibilities of indeterminacy, ambiguity and struggle for resignification or repositioning.'[116] We see in this statement Brown's critical engagement with at least three aspects of identity

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[110] Brown, *States of Injury, supra* note 36 at x-xi.

[111] *Ibid.* at 12.

[112] *Ibid.* at ix.

[113] *Ibid.* at 66.

[114] *Ibid.* at 28.

[115] Michel Foucault, "The Subject and Power", in Dreyfus and Rabinow, eds., *Michel Foucault: Beyond Structuralism and Hermeneutics* (Chicago, University of Chicago Press, 1982) at page 212, quoted in Wendy Brown, *supra* note 36 at 28-29. Emphasis added.

[116] Brown, *States of Injury, supra* note 36 at 27.

discourse: the definition and essentialising of identities, the relationship between identity and social status[117] and the interpretive and discursive implications of the construction and definition of identity.

Subject formation: sociological constructivism.

> It is a familiar thought that the bureaucratic categories of identity must come up short before the vagaries of actual people's lives. But it is equally important to bear in mind that a politics of identity can be counted on to transform the identities on whose behalf it ostensibly labors. Between the politics of recognition and the politics of compulsion, there is no bright line.[118]

Another contemporary response to the essentializing discourses of identity politics and multiculturalism has come in the form of sociological constructivism. This encompasses a number of diverse methodological approaches including, postmodernism, critical theory and postcolonial studies.[119] Sociological constructivists critique the concept of cultural and individual autonomy which difference discourse assumes. Further, constitutive approaches to law and society suggest that law has the power to produce that which it names. That is, law's power can be exercised to make people do things but also to make them become things they would otherwise not be.[120] In doing so, its productive force is invisible such that the subject presents an appearance of authenticity, unmarked by law. Law's hegemony is said to lie in this unobtrusiveness, this ability to produce a natural affect. The subject is produced 'as originator of his/her effects'.[121] The debate between liberals (who emphasize the rational autonomy of

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[117] Which raises issues of the dialectical formation of identity, the disaggregation of racial, cultural and sexual identity from social position, as well as the related abstraction of recognition from redistribution in liberal multicultural identity theory.

[118] Appiah, *supra* note 67 at 162-3.

[119] Benhabib, *supra* note 35 at 10.

[120] Halley, "'Like Race' Arguments", *supra* note 68 at 43.

[121] Judith Butler, *Bodies that Matter: On the Discursive Limits of "Sex"* (New York and London: Routledge, 1993) at 13. [Butler, *Bodies that Matter*]

the individual subject), libertarians and some sociolegal theorists on the one hand, and social constructivists on the other, pivots around subject agency. Constructivists argue that law has the capacity to 'colonize the soul'. Its cunning lies in the fact that it does so, 'at the same time that it reinforces our illusion of independence from law'. [122]

Taking a social constructivist perspective to analyse native title law, Peter Fitzpatrick characterizes the claims process as productive of 'native title', its subjects and their individual and collective identities.[123] He highlights the paradox that although native title claims are made and made out under the rubric of the common law 'recognizing' native title:

> Native title, however, is something created within the processes of its supposed recognition. To be recognised, native title has to be straitened and filtered through evidentiary and determinative processes which not only go to constitute it but which may do so in ways that are degrading and absurd. The introduced law so sweeps indigenous peoples into its encompassing disregard that it can fragment their existence by separating the inseparable, by marking apart and 'recognising' so much of traditional law and custom as goes to make up native title and not recognising the 'absent' rest.[124]

In this statement Fitzpatrick exposes the constituting power of native title law and normatively evaluates its effect as 'degrading and absurd'. He also gestures towards the partiality of recognition, the exclusion of the 'absent' rest, which will be a recurring theme in this thesis. Patrick Dodson has described the effacing effects of the native title process in slightly different terms, arguing that the denial of recognition is a denial of existence:

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[122] Austin Sarat and Thomas R. Kearns "Beyond the Great Divide: Forms of Legal Scholarship and Everyday Life" in Sarat and Kearns, *Law in Everyday Life* (Michegan, Ann Arbor: University of Michegan Press, 1993) at 29.

[123] Peter Fitzpatrick, "'No Higher Duty': *Mabo* and the Failure of Legal Foundation" (2002) 13 Law and Critique 233-252.

[124] *Ibid.* at 249. Emphasis added.

> If you say in the white fellas' legal system you don't have any native title because it's extinguished, then what you are really saying is that you, as an Aboriginal people that belong to that country, no longer exist.[125]

If, as has been argued, law creates an identity script and makes recognition conditional upon compliance with this script, then refusal or inability to comply cannot be apprehended by law in terms other than failure. This 'failure' is penalized by the denial of recognition, which, in the legal domain, is the denial of existence in terms meaningful to law. The insights of Fitzpatrick and Patrick Dodson reveal the twin dynamics at work in native title cases to 'efface' and 'construct' identities in the acts of partial recognition and identity construction.[126]

In addition to poststructuralists and critical theorists, sociolegal scholars have also engaged with the question of law's effects in constructing subjects and communities. They have done so with a view to reclaiming the agency of the subject while at the same time recognizing law's power effects. Of particular relevance are several American sociolegal studies of indigenous identity and land rights. These studies merit attention, as they reveal some of the same themes and problems as those explored in this thesis in relation to Australian native title law. The first, by Carole Goldberg-Ambrose, analyses the impact of law on Native American 'Indian group life' from a sociolegal perspective. She argues that:

> Law has influenced the shape of Indian group life by providing economic or political incentives for groups to organize along particular lines, by forcing groups into closer proximity with one another or separating them, and by creating an official vocabulary for the discussion of group life.[127]

This raises for consideration the relationship between recognition discourse and community. Douzinas has argued that '(c)ommunity is both the background and

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[125] Patrick Dodson, "Reconciliation", *supra* note 12 at 146.

[126] Merry, *Colonising Hawaii, supra* note 10 at 262.

[127] Carole Goldberg-Ambrose, "Of Native Americans and Tribal Members: The Impact of Law on Indian Group Life" (1994) 28(5) Law and Society Review, Symposium: Community and Identity in Sociolegal Studies, 1123-1148 at 1123.

effect of recognition. New rights create new ways of being in common and push the boundaries of the community.'[128] In an Australian context, native title law generates social interaction between native title claimants and, as a result, new or differently constituted 'discourse communities'.[129]

> The discursive practice creates communities of identity and authenticates their presence. It is integral to their 'registration' within the bureaucratic order of the state.[130]

The orienting pull of law offers 'incentives' and 'disincentives' for groups to organize politically in particular ways.[131] The native title claims process requires social interaction by an indigenous claimant group to define the terms of its claim and, in doing so, define itself in terms intelligible by law. This interaction is explored in the third chapter in an analysis of the demand that claimants present group coherence as the basis of a native title claim. It will be argued that indigenous claimants engage with this demand by materialising as a coherent cultural community, 'patching over' ambiguities and gaps and, in the process, creating a new social entity. The paradox of recognition discourse lies in the uneasy relationship between constructivism and the demand for authenticity.

Goldberg-Ambrose also argues that law has focussed attention on group definition at the level of the 'tribe'. Though this language is not used in Australian native title, there is a reliance on categories of 'society', 'group' and 'subgroup', which draw upon anthropological theories of indigenous social organisation, but enshrine particular ethnological definitions (often contentious) over others. One example of this is in the emphasis on patrilineal patterns of descent in many early

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[128] Douzinas, *supra* note 8 at 396.

[129] Bruce Kapferer, "Bureaucratic Erasure: Identity, resistance and violence – Aborigines and a discourse of autonomy in a North Queensland town", in Daniel Miller, ed., *Worlds Apart: Modernity through the Prism of the Local* (New York: Routledge, 1995) at 69.

[130] *Ibid.* at 70.

[131] Goldberg-Ambrose, *supra* note 127 at 1124.

ethnographic accounts. This has since been challenged by feminist accounts of contemporary Aboriginal land tenure systems, which highlight the dynamism and flexibility necessitated by the adversities of colonialism.[132] Serial matrifiliation and matrilateral connections to land provide flexible and dynamic 'survival strategies' for indigenous populations under threat. The rhetoric of authenticity and tradition is unable to recognize the legitimacy of adaptation as a survival strategy, deeming alternative group forms as illegitimate 'novel creations'.

In another sociolegal analysis of indigenous Native American group identity, Susan Staiger Gooding explores the relationship between group norms of legal and non-legal origin by which an Indian group involved in treaty litigation identifies itself.[133] She highlights the differences in group definition between layered indigenous self-definition mapped by reference to place, and, by contrast, bounded legal group definition which possesses a decontextualized racial referent. Her interest is in analyzing the dynamic between these systems of group definition. Law, she suggests, presumes itself to be outside the boundaries of tribal definition. In this way, it remains blind to its cultural power.[134] Law does not inquire into the process of identity formation, interested only in pre-formed individual and collective subjects. This has been described by Staiger Gooding as the 'blind spot' in treaty law, and extends both to internal and external processes of identity construction.[135] Of course, this excludes the role of the law in social construction, but it also excludes an inquiry into internal indigenous processes of self-definition, which may be responses in part to external pressures, but are nonetheless conceived and developed within the relevant community.

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[132] Marcia Langton discusses the role of grandmothers in 'recruiting' members to land-holding groups, arguing that this is not 'aberrant, but the outcome of strategic decisions which form part of a repertoire of strategies for sustaining land-holding group identity and continuity'. Marcia Langton, "Grandmothers' Law, Company Business and Succession in Changing Aboriginal Land Tenure Systems", in Galarrwuy Yunupingu, ed., *Our Land is Our Life* (St Lucia: University of Queensland Press, 1997) at 84-5 and 92.

[133] Staiger Gooding, *supra* note 17.

[134] *Ibid.* at 1199.

[135] *Ibid.* at 1205.

As a response to constructivist accounts of the relationship between law and the subject, Butler has developed the notion of provisional performativity, which assumes central importance to my analysis of subject agency in Chapter Four. This is an understanding of law's simultaneously productive and enabling power which is concerned with exploring the limits of constructivism. 'Performativity', in Butler's theory, is the reiteration of identity norms, with which subjects are forced to negotiate but whose efficacy is not assured. The scope for subject agency lies in the 'fissures' within identity categories. At this stage, I need only introduce Butler's theory as a critique of multiculturalism (and distinct from constructivism), but it will be more fully explored and applied in the final chapter.

The situated position of the recognizer.

Taylor's is a theory of recognition 'won' through exchange, though, he concedes, in danger of failing in contemporary times.[136] The viability of mutual exchange is challenged by the uneasy coexistence of two aspects of Taylor's theory: firstly, his demand that we let cultures defend themselves within reasonable bounds, recognising the equal worth of cultures and; secondly, that '(l)iberalism can't and shouldn't claim complete neutrality. Liberalism is also a fighting creed'.[137] The idea of judging the relative value of cultures as a pre-condition of 'recognition' and simultaneous acknowledgement of the non-neutrality of the observer captures one of the central paradoxes of recognition discourse. Both the method of exchange and the potential for failure link critically to the concept of 'recognition' space in native title law and the power dynamics that frame the space. Though native title is claimed to be a forum of recognition through exchange, the state legal system is not only situated and therefore partial, but hierarchically so. The common law's 'recognition' of 'other legal modes' is therefore conditional upon it remaining primary among them.[138] To put it another

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[136] Taylor, *Ethics, supra* note 22 at 48.

[137] Taylor, *Multiculturalism, supra* note 19 at 62 and 64.

[138] Fitzpatrick, *supra* note 123 at 238.

way, one social 'group', through its law, has exclusive or primary access to the means of interpretation and communication' of the world around, including other social groups.[139] This is described by Douzinas as 'the 'monologue of legal subjection.'[140] The didactic nature of identity construction highlights some further connections between some of the themes in this thesis: the situated recognizer, partial recognition and social constructivism. These connections are further explored, extended and critiqued in Chapter Four.

In addition to destabilizing coherent identity and cultural categories, contemporary anthropology has also radically revised its conception of the detached observer, cognisant of both its partiality and the constitutive effect. We saw this in Geertz's conception of the positioned observer. For Povinelli, this situatedness manifests in the demand that claimants be neither too similar nor too different from the observer. This reflects the paradox that difference must be demonstrated to prove entitlement to 'special treatment', but cannot be so radical as to enter the zone of the 'despised' or 'grotesque'.[141] More generally, majority identification with the subaltern is arguably a pre-requisite for social justice. As Michael Dodson, has reflected, 'reconciliation depends on being able to change places with the other person in your mind.'[142] This requires a materialization as identifiably familiar and human, yet, at the same time, as sufficiently different to be deserving of 'recognition' of cultural particularity. Sameness and difference are measured against both the majority and other minority groups granted identity rights protections. Thus, in his analysis of human rights and Hegelian recognition, Douzinas argues that in order for new rights claims to succeed, claimants must assert both their similarity with, and difference from, groups already 'admitted to the dignity of humanity', which requires that they appeal to both the universal and

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[139] Young, *supra* note 74 at 59.

[140] Douzinas, *supra* note 8 at 386.

[141] Cowlishaw, *supra* note 14 at 8.

[142] Michael Dodson, "Land Rights", *supra* note 4 at 40.

the particular.[143] He suggests that a simple claim to 'difference' in the absence of 'similarity' can work to rationalize the social or economic inferiority of the claimant group.[144] In Australian native title law there are multiple identity referents at play. It is, therefore, a tactical game that must be won to win law's recognition. The capacity of the subject to engage law's demands and successfully walk the tightrope between sameness and difference is explored in the following Chapter. Also explored is the relationship between materialization and subject consciousness.

A challenge to the static subject: subject agency, resistance and engagement.

The starting point in a consideration of subject resistance to law's power is a rejection of the instrumentalist view of law, which posits that law is an 'effective instrument of social engineering' which can control its social context.[145] This view of law has characterized some CLS and other structuralist perspectives. For example, CLS scholars critique human rights law on the basis that, as state law, it is inherently protective of the interests of the privileged and the perpetuation of the status quo. Law is seen as an oppressive and regulatory force, 'preventing or co-opting the struggles of marginalized groups'.[146] The rejection of instrumentalism can take many forms. Most relevantly, for the purposes of this thesis, it might take a legal pluralist or sociolegal form, in order to locate the capacity of the subject to resist either in alternative normative orders or in cultural context. With regard to the former, critical legal pluralism has shed light into the dynamics of subject engagement with, and resistance to, the normative systems in which they live. In a native title context, it defines the act of recognition as one of translation, and though accepting the reality of misrecognition, questions the

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[143] Douzinas, *supra* note 8 at 399.

[144] *Ibid.* at 401.

[145] Sally Falk Moore, "Law and Social Change: The Semi-Autonomous Field as an Appropriate Subject of Study" in Sally Falk Moore, *Law as Process,* 2nd Edition. (Oxford: James Currey, 2000) 54-78 at 54.

[146] Kostiner, *supra* note 66 at 325.

definition of this process as uni-directional and destructive. Rather, critical legal pluralism posits that mis-translation is 'productive' and 'transformative'.[147] For example, it posits that reverse transplants occur in the way that the 'legal histories' of indigenous subjects become part of the common law. Sociolegal scholars share the legal pluralist's scepticism about law's instrumental and constitutive effect, their analysis also emphasizing intersection, exchange, hybridity, agency and resistance.

The connections between pluralist and sociolegal perspectives on law and society are highlighted in the work of Sally Engle Merry, a legal anthropologist, interested in law's cultural power, non-institutional domains of norm development, interactivity and subject resistance. Merry defines law as a 'cultural practice', which produces 'new cultural understandings and actions', rejecting the idea that law is exclusively a structure of power.[148] To clarify, Merry is alive to law's oppressive effects, but sees a more complicated reality in the interaction between law and its subjects. Her interest, like legal pluralist and 'everyday law' perspectives, is in 'law at the bottom fringes, where it *intersects* the social life of ordinary people rather than where legal doctrines are created.'[149] Merry's approach is typical of sociolegal studies in its attempt to 'avoid the binaries' between colonizer and colonized, to explore the complex facts of 'agency' and 'historical change'.[150]

> Understanding appropriation and translation illuminates the less elite dimensions of the norm change process and highlights areas where norms and ideas are resisted or only temporarily and tentatively adopted.'[151]

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[147] Anker, *supra* note 54.

[148] Merry, *Human Rights, supra* note 81 at 228-9.

[149] *Ibid.* at 8.

[150] *Ibid.* at 12.

[151] *Ibid.* at 222.

The phenomena of hybridity, normative exchange and legal transplants, of critical interest to legal pluralists, legal anthropologists and sociolegal scholars, can be observed in the native title claims process, and I will devote part of the next chapter to these observations. However, beyond noting the occurrence of these phenomena, I am interested in probing to what extent the dialogue between the common law and indigenous belief systems is mutually transformative. In the following chapter, I ask, if there are gaps in which appropriation and resistance takes place, does the authoritative power of law nonetheless reassert itself as the 'fundamental terrain for challenges to the existing social order', incorporating resistance within its terms, as Merry suggests.[152] If so, do we characterize this as defeat, victory or something more ambiguous for indigenous claimants? The question can be expressed in terms of whether indigenous engagement with law's terms represents an act of resistance *against,* or only *within,* the system, if not an intended product of it.

[152] *Ibid.* at 264-5.

Chapter Three: Dispelling the myth of the static subject: law's demands and indigenous claimant engagement.

Informed by the critiques of multicultural recognition discourse elaborated in the previous chapter, this Chapter critically examines both the demands made by native title law and subject engagement with these demands. I begin by emphasizing that Australian native title legislation and case law both frame and evidence a *process* in which indigenous claimants are participants, in which they are often involved for significant periods of their lives.[153] The individuals and communities involved are inevitably affected by the process, in the way that they understand the common law, their culture, their communities and their selves. They can also be seen to engage or interact with law and its terms. For this reason, they do not present to the court as pre-formed subjects, static throughout the claims process. Rather, their participation in, and engagement with, law is an active, affective and, arguably, effective process. Therefore, in light of key critiques of multicultural recognition discourse introduced in the previous chapter, this chapter seeks to set out and critique the demands that law makes of indigenous subjects as preconditions of recognition, as well as the ways in which indigenous subjects interact with these demands. An analysis of the character of this interaction is postponed until the following chapter where questions of law's constitutive power, subject agency and resistance are addressed.

The demand for claimant representation of a unitary collective and cultural identity.

Native title law requires that a claimant group define itself by reference to a collective identity, and community adherence to 'traditional laws and customs'.

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[153] For example, the *Yorta Yorta* claim was lodged in 1994, the trial hearings commenced in 1996, the adverse trial judgment was delivered in December 1998 and the High Court appeal decision handed down in 2002. This process therefore took eight years, in addition to the tribunal process and pre-claim preparation.

Where a claim is made for 'group' or 'communal' rights, claimants must demonstrate that rights and interests are possessed, traditional customs observed, and connection to the land maintained on this basis. As Callinan J stated in *Yorta Yorta:*

> Claimants, to succeed, must therefore prove that there are rights and interests, that is to say, current rights and interests currently acknowledged and observed, by an identifiable group, or an individual or individuals.[154]

Further, the issues of group identity and membership in a native title claim are put in particularly stark relief when subject to a competing indigenous claim for the land. Claimant groups must demonstrate their particularity, as a distinct 'group' or 'community' observing the same 'traditional laws and customs'. They must therefore prove their distinctiveness, not only from 'whitefellas', but also from other Aboriginal groups.

Despite the shifts, realignments, relocations and dislocations in group affiliation and identity both before and throughout colonization, native title claims do not 'overcomplicate' the case advanced, instead, 'deleting countermappings' of group formation in order to present coherence. This sits uneasily with the reality of shifting boundaries, for example, in the 'transformation of land-holding patterns from small "clans" to ... wider regional groupings'.[155] Povinelli traces or 'exposes' the exercise of deliberate claim framing in the *Kenbi* Land Claim, which relied on a patrilineal clan formation, the dominant though disputed anthropological model, despite a messier reality of indigenous land ownership.[156] Likewise, the *Yorta Yorta* claim was framed as one on behalf of 'Members of the Yorta Yorta Aboriginal Community':

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[154] *Yorta Yorta, supra* note 61 at para. 174.

[155] Langton, *supra* note 132 at 86.

[156] Povinelli, *supra* note 1 at 211.

> ... a term which the application more precisely defines as comprising men, women and children of Aboriginal descent who are descendants of the original inhabitants of an area identified by reference to a map attached to the application (the claim map).[157]

Although 'community' was defined as descendants within a geographic area, the name 'Bangarang' was also used to refer to the claimant group.[158] These examples reveal the strategic framing of claims such as to present unity and cultural coherence despite a more ambiguous social reality. They therefore demonstrate claimant engagement with law's demands.

The phenomenon of claimant engagement is one of the most interesting paradoxes arising from the alterior assertion of human rights claims. 'Paradoxical', given that concepts of cultural coherence have been rejected as redundant by many contemporary leftist commentators on indigenous rights and social justice. Indeed, Merry states that:

> ...ironically, as contemporary anthropology is discarding this older concept of culture, it is being vigorously reappropriated by indigenous peoples and ethnonational movements searching for sovereignty and self-determination.[159]

In native title cases, indigenous claimants adopt the language of cultural homogeneity and essence in their claims, a phenomenon that is not matched by the complex and ambiguous relationship that individuals may feel towards their community, culture and identity. Gillian Cowlishaw describes this pattern of 'life' following 'art' in 'the artistry of asserting imagined unitary identities', and finds in this evidence of the 'force of the terms' of Aboriginality.[160] This prompts consideration of the character of these representations. Does the assertion of

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[157] *Members of the Yorta Yorta Aboriginal Community v Victoria* (1999) 4(1) AILR 91; [1998] FCA 1606 at para. 9. ['*Yorta Yorta FCA*'].

[158] *Ibid.* at para. 50.

[159] Merry, *Colonising Hawaii, supra* note 10 at 30.

[160] Cowlishaw, *supra* note 14 at 8.

cultural authenticity reveal the 'replaying' of an existing cultural form 'with different meanings or practices'[161], a 'creative' or 'naïve' reappropriation?[162] This question is addressed in the final chapter.

The demand for individual and collective self-definition.

An exercise in group and individual self-definition is a pre-requisite to native title claim-making. This exercise involves the identification and naming of a society and/or group which forms the basis of the claim, and the identification and classification (or codification) of the traditional 'laws and customs' of the relevant society (which requires their conceptualization as 'laws', potentially a new and foreign re-imagining). It creates opportunities for, and requires, the meeting of individuals within the group to formulate and organize the claim. This generated social action eludes classification as either 'authentic' or 'constructed' and reveals the dichotomy as both distorting and incapable of recognizing that which cannot be contained by the opposition.

One of the primary acts of self-definition involved in the native title process is the naming of groups and societies. It is often stated that the name that a group adopts for itself means nothing more than 'the people', thus posing the question of how this defines them as a distinct 'people'. The basic flaw in this premise is self-evident.[163] What is more interesting is that the process of identifying one's group or society by giving it a name often does not happen until a native title claim is made. The act of naming is both subversive and constitutive. Subversive, because it can only ever be a fictional representation of unity, perhaps parodying the norms that impelled it in the excess of its cohesion. Constitutive, because,

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[161] Merry, *Colonising Hawaii, supra* note 10 at 846.

[162] Bill Maurer, "The Cultural Power of Law? Conjunctive Readings", (2004) 38(4) Law and Society Review 843 at 846.

[163] The lack of an emic label being not unusual, and the seemingly generic expression 'the people' reflecting the limits of the known.

'group names are an extremely productive cultural practice for establishing and mediating identity'.[164] In the creative act of naming, a new entity is born, differently imagined and framed from any social entity that existed before.

The oppositional rhetoric of 'authenticity' and 'fabrication' is applied to categorize claimants who adopt an 'anthropological construct' as their group identity for the purposes of a native title proceeding. The submission that a group name is therefore either, at best, inauthentic or, at worst, bearing no relation to 'reality'[165], is commonly made by respondent parties in native title litigation. For example, in *Neowarra v State of Western Australia* [*'Neowarra'*][166] , the State of Western Australia submitted that the named society, the 'Wanjina Wunggurr community', was a 'novel creation'. In response, Professor Sutton, the claimants' anthropologist, stated that the lack of an emic label created by the community itself was not unusual.[167] He then matter-of-factly acknowledged the reality of constituted identity and the orienting pull of the common law:

> ... there is demonstrably a set of beliefs, practices, laws and customs which is shared by a group of people for whom a label, the Wanjina Wunggurr community has been *created as a shorthand* for an entity *defining itself in this situation in relation to a western legal process.*[168]

Interestingly, in making a finding on this issue, the trial judge accepted as unproblematic that the 'Wanjina-Wunggurr community' is an 'anthropological construct'.[169] Nonetheless, he accepted it as a valid group identification on the basis that the conglomerate community proposed is 'not unique in the Kimberley

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[164] Staiger Gooding, *supra* note 17 at 1187.

[165] *Jango v Northern Territory of Australia* [2006] FCA 318 at paras. 348 and 352. [*Jango*]

[166] *Neowarra v State of Western Australia* [2003] FCA 1402. [*Neowarra*]

[167] *Ibid.* at para. 395.

[168] Emphasis added.

[169] *Neowarra, supra* note 166 at para.398.

literature [but] documented in the prior ethnography' and 'is supported by the evidence of the applicants'.[170]

The exercise of self-defining by reference to anthropological concepts is a delicate exercise, often necessary (or perceived to be) but not without legal risks. For example, several West Australian native title claims have identified their system of traditional laws and customs as deriving from the anthropological notion of the Western Desert Cultural Bloc (WDCB).[171] These claims have been based on a group of individuals whose normative system is said to derive from that of the larger WDCB society, but who represent merely one group within the much larger normative society. In *Jango v Northern Territory of Australia* ['*Jango*'], the respondents submitted that the WDCB was an 'anthropological construct', not only therefore not indigenous but also not bearing any relation to 'reality'.[172] These kinds of submissions have forced expert witnesses into a defence of the 'authenticity' of anthropological 'constructs':

> The cultural and linguistic unity of the Western Desert is recognised by Aboriginal people of the region. The "Western Desert bloc" as it is known among scholars is not merely an analytical construct arrived at by non-Aboriginal academics, but the academic recognition of a pre-existing unity of a striking nature, given its size relative to other cultural blocs in Aboriginal Australia.[173]

I cite this example to highlight the discourse of authenticity and fabrication that surrounds the presentation of collective identities. Although Sackville J ultimately rejected the 'fabrication' argument made by the respondents, he seemed to

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[170] *Neowarra, supra* note 166 at para. 398.

[171] See, for example, *De Rose v State of South Australia* [2002] FCA 1342, *Jango v Northern Territory of Australia* [2006] FCA 318 and *Harrington-Smith on behalf of The Wongatha People v the State of Western Australia* (judgment reserved).

[172] *Jango, supra* note 165 at paras. 253 and 344.

[173] Professor Sutton in *Jango, supra* note 165 at para. 346.

implicitly accept the authentic/ constructed dichotomy. In this case, he merely found that the *Jango* claim fell on the right side of the line.

The claimants in the *Yorta Yorta* claim also adopted a description of their community prepared by a consultant anthropologist.[174] At trial, Olney J expressed some frustration with the ultimately 'sterile argument' between experts, in which 'much time and considerable learning' was applied, as to the correct label for the claimant group.[175] He seems to imply that these experts had somehow failed to reach an ascertainable truth. In this case, the 'reality' of the claimants' collective identity proved complicated. Significant shifts in group constitution and identity were revealed in the evidence, documented in colonial historical and anthropological materials which traced the adoption and then abandonment of various group labels.[176] These various acts of self-definition highlight the constructed and arbitrary nature of native title claim groups, their apparent coherence misrepresenting their inevitably blurred boundaries. It also highlights the responsiveness of group identity to external pressures, colonial or environmental. The structures, patterns and trajectories of group membership are responsive to environmental, economic and social pressures within and between indigenous communities as well as the impacts of settlement and the orienting pull of native title law. Native title law's demands for unity and coherence cannot capture these complexities, its orienting pull distorting and constituting the identities it purports to 'recognize'.

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[174] *Yorta Yorta, supra* note 61 at para. 14.

[175] *Yorta Yorta FCA, supra* note 157 at para. 59.

[176] By way of example, in a petition for land made in 1881, tendered by the claimants, the petitioners are described as members of the 'Moira' and 'Ulupna' tribes (rather than the Yorta Yorta). Olney J notes that these are not descriptions found in the writings of a pastoralist (Curr) on whose evidence he substantially relies. His inference from Curr's writing is that the collective identity expressed by the petitioners rested on an identification with the two main pastoral properties in the region rather than with the aboriginal sub-groups referred to by Curr.' *Ibid.* at para. 120.

The demand for disorientation.

Native title's orienting pull exists simultaneously with its demand that indigenous claimants be 'disoriented'. This demand stems from the principle that 'the validity of an argument stands in a negative relation to self-interest'.[177] Native title law's orienting pull involves two aspects. One is that it requires the construction and performance of identities and cultures so as to attract law's recognition. The second manifests in the rewarding of witnesses who seem to be disinterested in the proceedings, that is, not orienting their evidence or presenting their identities mindful of law's demands. Povinelli describes this as the impossible demand that indigenous subjects:

> ... at once orient their sensual, emotional, and corporeal identities towards the nation's and law's image of traditional cultural forms and national reconciliation and at the same time ghost this *being for* the nation so as not to have their desires for some economic certainty in their lives appear opportunistic.[178]

'Opportunism' may be 'revealed' by claimants who know too much about the native title claims process, are obviously conscious of and responsive to its demands or, more generally, have engaged with 'the democratic form of capital and governance within which [indigenous subjects] live'.[179] This of course denies, or deems illegitimate, the reality of contemporary indigenous social and economic life. While some Aboriginal people continue to hunt and gather, others seek to use the resources of their land to develop 'a more secure economic base for their

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[177] Povinelli, *supra* note 1 at 34. Povinelli identifies this as one of the three principles of contemporary multiculturalism. The other two principles she identifies are: 'that all deliberations that affect the public should be accessible to public scrutiny' and 'that in certain contexts principled public debate ought to give way to a collective moral sense – and, not only that public debate must give way, but that collective moral sense should be protected from the procedures of critical reason.'

[178] *Ibid.* at 8.

[179] *Ibid.* at 170.

family and community'.[180] Further, spiritual, cultural and economic interests in land are not disaggregated in indigenous consciousnesses, rather, a relationship to land may be both 'profoundly spiritual' and "profoundly practical'.[181] This is another instance in which native title law's dichotomy between authenticity and fabrication, or tradition and modernity, admits of no in-between.

The astute, 'modern' and 'oriented' indigenous claimant attracts law's reprobation. For example, in *Yorta Yorta,* Olney J dismisses the evidence of the younger generation of claimants, declaring them self-interested and deliberate in the presentation of their identities. In doing so, he appears to deny the legitimacy of internal cultural dissonance and also to suggest that indigenous articulacy is inauthentic:

> Evidence based upon oral tradition passed down from generation to generation does not gain in strength or credit through embellishment by the recipients of the tradition and for this reason much of the testimony of several of the more articulate younger witnesses has not assisted the applicants' case.[182]

In the *Yorta Yorta* High Court decision, Justice Callinan also expresses his wariness towards evidence distorted by 'self-interest':

> The appellants suffered two particular disadvantages to which regard had to be made: loss of traditional knowledge and practice because of dislocation and past exploitation; and, by reason of the lack of a written language and the absence therefore of any indigenous contemporaneous documents, the need to rely extensively upon the spoken word of their forebears, which, human experience knows, is at risk of being influenced and distorted in transmission through the generations, by, for example, *fragility of recollection, intentional and unintentional exaggeration,*

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[180] Yunupingu, *supra* note 6 at 11.

[181] Michael Dodson, "Land Rights", *supra* note 4 at 43.

[182] *Yorta Yorta FCA, supra* note 157 at para. 21.

> *embellishment, wishful thinking, justifiable sense of grievance, embroidery and self-interest.*[183]

Both of these extracts illustrate the alignment of authenticity with tradition and 'disorientation' in native title recognition discourse. Interestingly, both judges flirt with the idea of witness 'deception', which lurks beneath their more subtly obscure invocations of 'embellishment', 'intentional exaggeration', 'wishful thinking', 'embroidery' and 'self-interest'. One might observe how different this discourse is from that in cases involving non-indigenous claimants, in which self-interest is generally assumed. There is, in these cases, a very clear line drawn by the law between orientation and deception. That which lies in-between may be subject to an adverse finding on credit which affects the weight given to the evidence, but does not automatically undermine the claim itself. In other words, orientation is assumed, rather than 'exposed' and penalized, in non-native title cases.

For as long as the courts deny law's constitutive effect and its orienting pull, they question the admissibility and persuasiveness of evidence generated during the claims preparation process. It is frequently submitted by respondents in native title proceedings that the claimants' interest in their land, the frequency with which they visit sacred sites, perform ceremonies and the studied attention to family and community history, are all recent phenomenon, oriented towards the native title proceeding. The assumption is that these interests, once subjects are declared to be interested, are not bona fide or 'authentic'. Although these submissions are not always accepted by the Court, they nonetheless play a role in shaping the discourse about authenticity.

> Tradition(s) are conventionally conceived as either authentic and incommensurable, with distortion or assimilation resulting from cross-fertilization, or else as constructed, where the recognition of agency carries the implication of spuriousness.[184]

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[183] *Yorta Yorta, supra* note 61 at 143. Emphasis added.

[184] Cowlishaw, *supra* note 14 at 27.

By way of example of a typical respondent allegation of 'spuriousness', in *Neowarra,* the State accepted that 'the right to maintain and protect places of importance under traditional laws, customs and practices has been made out in relation to various Wanjina and Wunggurr sites identified in the evidence', but nevertheless maintained that 'sites that have not been visited, and those that have only been visited *in connection with* the preparation of a native title claim, are to be disregarded.'[185] Sundberg J rejected the submission, but not on the basis that the submission denied law's inevitably constitutive effect, but rather that to recognize rights only to a number of 'pinpricks' in the landscape, would fail to recognize the connection between Wanjina and larger areas of land (Wanjina being a Dreamtime figure who laid down the law across the land).[186] A similar submission was made, and accepted at trial, in *De Rose v State of South Australia* [*'De Rose'*].[187] In that case, O'Loughlin J generally disregarded the applicants' evidence relating to the period after the commencement of the trial. However, the Full Court stated that:

> In the absence of any finding that those actions were *contrived or otherwise not genuine,* there is no reason why they should not be taken into account. Indeed, the evidence of the appellants' actions after 1994 (assuming their actions *genuinely reflected their beliefs*) is of particular significance because the question posed by s 223(1)(a) of the NTA is cast in the present tense.[188]

In so stating, the Full Court rejected the automatic assumption that activities engaged in after the lodging of a native title claim are 'oriented', and thus, 'inauthentic'. However, they nonetheless maintained the existence of a clear

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[185] *Neowarra, supra* note 166 at para. 289. Emphasis added.

[186] *Ibid.* at para. 289.

[187] *De Rose v State of South Australia* [2002] FCA 1342. [*De Rose*]

[188] *De Rose v State of South Australia* (No 2) (2005) 145 FCR 290; [2005] FCAFC 110 at para. 103. [*De Rose FCAFC* 2] Emphasis added.

distinction between the 'genuine' and the 'contrived', as though the performative nature of a native title claim did not necessarily elude this distinction.

The reality of indigenous claim-making is by definition strategic and oriented. This is occasionally overtly acknowledged (and accepted) by participants in the native title process. For example, Professor Sutton, the applicant's anthropologist in the *Jango* claim, gave evidence that some of the claimants had fabricated evidence about birth places and their resulting attachment to land, to increase their chances of success. Claimants, he said, would sometimes intentionally 'move' their birthplaces to 'an area of great interest', such as key sites within a land claim area, in order to obtain financial benefits.[189] Professor Sutton attributed what he termed a 'cultural difference' about truth telling to the fact that 'sheer survival in the Western Desert in the past demanded a highly opportunistic strategy for gaining access to resources'.[190] His statement is interesting, both in his expansive category of the 'cultural' (to incorporate misrepresentation) and in his realist language of redistribution. The expansion of 'culture' beyond "high culture" (ancient tradition) to include the opportunistic and subversive is quite radical, but is necessitated and confined by the discourse of multiculturalism. To be heard and valued in this discourse, claims must be made as claims of cultures of difference. Thus all behaviours, practices, beliefs and social interactions must be framed as aspects of culture. In this statement, Sutton also challenges the general abstraction of culture from the material rewards for its proof in native title recognition discourse, a critique also made in this thesis.

The attempt to reconcile claimant orientation with 'culture' raises interesting questions about the parameters of the 'cultural' and the dangers of multicultural discourse. These questions arise in the context of the individual's decision to claim one area or one particular land-holding basis over another, often made by

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[189] *Jango, supra* note 165 at para. 320.

[190] *Ibid.* at para. 320.

reference to the likely success of the claim.[191] For example, Marcia Langton cites a witness in a land claims hearing who was asked whether the decision to choose to matrifiliate, patrifiliate or make a claim for grandparents' country was informed by the land available for claim. The witness agreed that it was a 'big determining factor'. Interestingly, the witness then connected this back to an Aboriginal 'tradition' of personal responsibility:

> If somebody's claim through their father's father is absolutely hopeless, then it's quite natural that the father's mother or mother's mother or mother's father is a claim that they should legitimately pursue, you know. But it is a judgment for the individual .... And I would hope that what I draw from the Aboriginal tradition is this personal responsibility to understand what right you have to assert and what responsibility you have to defer to people.[192]

This is a fascinating extract, not only for what is says about witness orientation, but what it suggests about indigenous consciousness. The attempt to reconcile claimant orientation, strategy and the arbitrariness of connection back to 'Aboriginal tradition' is curious. Accustomed to indigenous compliance with the traditional identity script, it is unnerving to read such a frank 'admission' of strategic claim making. Our conceptions of 'authenticity' and 'tradition' are confused further by the witness's description of this strategy as 'natural' and 'legitimate'. This challenges the familiar authenticity/ fabrication dichotomy. Still more confounding is the reversion to script in the attribution to 'Aboriginal tradition', incongruously connected to the rhetoric of 'personal responsibility' which emanates from neo-conservatives (and New Labour) in economic rationalist welfare policies. Whether the admission of orientation is subversive or whether the reversion to script reveals the performativity of the statement is considered in the following chapter in the discussion of subject agency and resistance.

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[191] Langton, *supra* note 132 at 104.

[192] Transcript, *Lakefield National Park Land Claim,* p. 1712, extracted in Langton, *ibid.* at 104.

The suspicion towards oriented witnesses may extend to include expert anthropologists, who are sometimes seen to have a vested professional or emotional interest in the claimants' success. For example, in *Jango*, Sackville J questions the disinterestedness of both the indigenous claimants and their expert anthropologist, Professor Sutton. The latter's report was prepared after interviews conducted with the claimant group, 'the field work designed to gather that information [having been] undertaken in the context of the very litigation in which the claims of many of the informants were formulated and assessed.'[193] Sackville J is wary of the report's findings, concerned that no field work was carried out through 'disinterested academic endeavor', outside the context of the native title claim. He also adverts to the orientation of the indigenous interviewees, stating that '(m)any, if not all of Professor Sutton's informants were aware that a compensation claim was pending at the time they spoke to him and were also aware that their observations might be used for the purposes of the litigation.'[194] He later describes some of the applicants' evidence relating to the laws and customs of the Western Desert as 'self-serving'.[195] These comments reflect and reinforce the assumption that it is possible and desirable that native title claimants be both unaffected and uneffected by the native title claims process and not attuned to its demands. This denies the reality of witness statement making in non-native title cases: always the product of the litigation process, always oriented to that purpose, always therefore opportunistic. It also reflects the fallacy of the pre-formed subject, awaiting only the opportunity to present an authentic traditional identity for the court's inspection. Finally, it denies the reality that native title claimants are engaged in a kind of seductive dance (traditional, of course), through which they hope to attract law's recognition and the concomitant material rewards contingent upon this.

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[193] *Jango, supra* note 165 at para. 319.

[194] *Ibid.* at para. 319.

[195] *Ibid.* at para. 451.

The demand for unambiguous attachment to tradition.

> The shadow of the classical Aboriginal tradition hovers over contemporary Aboriginal self-constructions. A Murri [Aboriginal] who says bitterly, "I hate full-bloods" is articulating the sense of never being able to measure up as a native of Australia against the full-bloods' unarguable alterity and authenticity.[196]

Native title law demands that Aboriginal claimants correspond to an image of traditional identity. The meaning of 'traditional' was elaborated by the High Court in *Yorta Yorta*. In their joint judgment, Gleeson, Gummow and Hayne JJ stated that:

> ... "traditional" does not mean only that which is transferred by word of mouth from generation to generation, it reflects the fundamental nature of the native title rights and interests with which the Act deals as rights and interests rooted in pre-sovereignty traditional laws and customs. [197]

'Tradition', according to law, therefore means more than the mode of transmission through generations. It refers to the cultural *character* or *content* rather than *context.*[198] By constructing this model of tradition as necessary to attract the state's recognition, law designates traditional identity as innate, therefore unable to be revived, and static, therefore unable to be reinterpreted. The value of tradition stems from cultural and historical purity - resistance to defilement by colonial influence. By constructing tradition as the only legitimate form of Aboriginal identity, native title law implies a distinction between 'real Aborigines' and 'urban blacks'.[199] As Cowlishaw suggests:

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[196] Cowlishaw, *supra* note 14 at 222.

[197] *Yorta Yorta, supra* note 61 at para. 79.

[198] I derive this distinction from Kymlicka, *supra* note 25 at 166-167.

[199] Ms Jaqui Katona, quoted in the *Australian,* 6 October 1994. "Native Title Isolates Urban Blacks: Activist". Extracted included in Bain Attwood and Andrew Markus, eds., *The Struggle for Aboriginal Rights: A Documentary History* (Sydney: Allen & Unwin, 1999) at 341. Katona also describes the injustice of members of the Stolen Generation being doubly punished, now unable to prove native title due to loss of

> To accord legitimacy to difference that is characterized by poverty and marginality without any exotic cultural distinctiveness demands more of the national imaginary.[200]

She observes that when Aboriginal people are asked to identify 'definitive cultural markers', 'they look to the past...current, everyday practices are seldom claimed explicitly as sources of cultural pride'.[201] She argues for a redefinition of 'culture' to include disordered public and social spaces.[202] Further, she suggests that the desire for uniqueness signals a desire for independence.[203]

While some indigenous subjects reject the reclaiming of 'tradition' as contrived, others deny accusations of inauthenticity, defending the continuing relevance of traditional life:

> Some critics claim that we have been fostering and aiding some romantic notion of living museum pieces out in the desert – hunting and gathering at their leisure, painting a little, unable to think of the future, unable to live in the future... It is vital for non-Aboriginal Australians to understand that there are no museum pieces out there: the culture is vibrant and alive. Aboriginal people have seized the opportunity that the Land Rights Act has provided and over the last 20 years have worked hard to maintain and reinvigorate our culture – a process that is simply impossible without our land.[204]

The oppositions within contemporary Aboriginal identity correspond to internal divisions within and between indigenous subjects. I suggest in the following chapter that this might be best understood in the ideas of performativity and multiple subjectivities.

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connection and knowledge of traditional land. She notes the suspicion of opportunism directed by land councils towards urban indigenous persons who return to their traditional lands. At 342.

[200] Cowlishaw, *supra* note 14 at 244.

[201] *Ibid.* at 219.

[202] *Ibid.* at 245-248.

[203] *Ibid.* at 200.

[204] Tracker Tilmouth, "Taking Stock of Land Rights" in Galarrwuy Yunupingu, ed., *Our Land is Our Life* (St Lucia: University of Queensland Press, 1997) at 23-24.

The demand for proof of indigenous desire.

The courts in native title cases calibrate indigenous entitlement against the sincerity of desire expressed by claimants for land. This exists uneasily with the demand that they be 'disoriented'. In his trial decision in *De Rose,* O'Loughlin J comments that the indigenous claimants failed to give 'detailed evidence that amounted to statements of intention to resume the observance of traditional customs or the maintenance and acknowledgement of traditional laws' in the event of a finding that native title rights existed.[205] He refers to the evidence of several witnesses who, asked what their 'hopes and expectations' were with respect to De Rose station, responded variously:

> I haven't really given that much consideration to that far down the track.

> We'll tell the young people to do the cattle work and they can do the work. I'll tell them ... Yes, if someone might help us out by buying the cattle for us, we will run that cattle.[206]

One witness gave evidence to the effect that, if found to have native title rights, indigenous people would run their own cattle on the land, 'evicting' 'whitefella' pastoralists. In reference to this, O'Loughlin J comments:

> In other words, it was quite clear in Riley's mind that he, at least, was seeking exclusive possession, occupation, use and enjoyment of De Rose Hill Station. Furthermore, it would seem that, whatever his reasons might be for wanting exclusive possession, they included the wish to carry on a commercial cattle operation. Despite these answers, however, Riley said that he had not spoken to any of the other Aboriginal people about what might happen if the claimants were to win the case.[207]

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[205] *De Rose, supra* note 187 at para. 39.

[206] *Ibid.* at para. 42.

[207] *Ibid.* at para. 43.

Several contradictory expectations of indigenous claimants are evoked in this extract. The first is that claimants should seek rights to land that are *distinctly different* from 'whitefella' patterns of land ownership. Expressing a desire for exclusive possession, or to run cattle on the land in a 'commercial cattle operation' is, it is suggested, 'un-Aboriginal'. Moreover, despite the general demand made by native title law that indigenous claimants appear not to be oriented towards the legal process and its requirements, they nonetheless must demonstrate that they *really want* the land in question. This is reflected in the negative view that O'Loughlin J took of the witnesses' failure to have discussed and come to a clear agreement about future land 'use'. This represents yet another example of native title law's ingenuity – another tight rope to be walked by Aboriginal claimants. On one hand, in making a demand that claimants be *authentically interested* and able to articulate this interest, the law assumes that a people accustomed to a reality of dispossession have at hand a ready vision of future land use and control. This is, perhaps uniquely, a future-regarding aspect of native title, rare in a law that fetishizes tradition and the past. On the other hand, the law demands disinterest in the outcome of the claim, and is suspicious of any articulation that approximates common law property concepts. Aboriginal claimants must therefore want the land *differently* and *sufficiently* enough to prove their entitlement, without revealing their interest as opportunism.

A conceptual analysis of indigenous engagement with law's demands: 'sedimentation', 'translation' and 'cross-fertilization'.

The term 'sedimentation' might be used to analyse several forms of claimant engagement identified in this Chapter. It describes the phenomenon of legal discourse infiltrating and forming subject consciousness. As such, sedimentation evidences law's cultural imposition and its ambiguous effects on the subject. In native title law, legal multicultural recognition discourse is sedimented into the consciousness and voice of indigenous claimants. Its ambiguous effects are evidenced by the acts of appropriation, subversion and resistance in which indigenous claimants engage. For the purposes of this analysis, I identify two

particular examples of sedimentation. I then subject these examples to the legal pluralist contention that 'sedimentation' should not be conceived as a general descriptor of the relationship between law and subject, where this might imply a uni-directional constitutive process. Rather, legal pluralists understand the relationship as one of dynamic, inter-normative exchange and mutual constitution. Examples of 'legal transplantation' or 'cross-fertilization' are identified in the mutual exchange of language and discourse and the adaptations of each discourse to the terms of the other. Having introduced and described this phenomenon, the final chapter analyses the significance and meaning of this exchange by employing theories of power, subject agency and performativity.

The first example of sedimentation I identify for this analysis is the strategic use of legal language to frame native title claims. This obviously occurs at the level of the formally documented statement of claim, as prepared by the claimants' legal advisors. However, it also infiltrates indigenous descriptions of their identity, attachment to land and entitlement, for example, in the use of common law property concepts, anthropological jargon and the language of obligation and sanction.

The filtering down of common law vocabulary into use by indigenous claimants can be characterized both as one of law's constitutive effects but also as a phenomenon of creative engagement by indigenous subjects. This has been given considerable attention by Merry, both within her work on the colonizing of Hawaii and in her recent book on the translation of international human rights law into 'local justice'.[208] Merry's nuanced approach, informed by post-colonial theory, is characterized both by an interest in the phenomena of 'transfer' and 'duality' as dynamic and mutual, but also of the realpolitik of law as an instrument of colonization through judicial imposition of culture.

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[208] Merry, *Human Rights, supra* note 81.

Indigenous witnesses in native title cases frequently use occidental concepts of land ownership and possession to attempt to explain their own attachment to land. For example, the word 'trespass' is often employed to describe the act of an indigenous person entering a traditionally restricted area of land or an indigenous person from one 'group' entering the land of another.[209] In *Neowarra,* it was submitted that the applicant's claim to exclusive possession was undermined by the fact that no witness used the word 'trespass' to describe a pastoral leaseholder. As Sundberg J points out, '(t)hat is not surprising given the pastoralists' lawful occupation of their land and Aboriginal familiarity with and acquiescence in that occupation.'[210] However, had indigenous witnesses used the language of trespass, one wonders whether the contrary submission would predictably have been made, that this signalled a non-indigenous attachment to land.

The concept of 'ownership' is also frequently used. In *Neowarra*, Justice Sundberg rejected the submission that this evidenced a non-indigenous relationship to land, mindful of witnesses' limited English, and instead found that 'own' functioned as an assertion that land 'belonged' to the witness, in the sense that he or she was 'the boss for it'.[211] Clearly, the use of common law private property concepts by indigenous witnesses is partly explicable by the fact that evidence is often given in English with no equivalent words for some indigenous concepts of attachment to land. It is also explained by the fact that witnesses are inevitably oriented to the legal process and its language and perceive that, in the eyes of the law, the highest level of attachment is manifested in ownership. The logic of an exclusive possession claim might be partly explained by the reality that the claim indigenous peoples seek to make is one of sovereignty, but this is

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[209] Mary Yarmirr in *Mary Yarmirr v The Northern Territory of Australia* [1998] FCA 771 at para. 110 and 113. ['*Yarmirr*']

[210] *Neowarra, supra* note 166 at para. 378.

[211] *Ibid.* at para. 378.

a claim the courts will not hear.[212] That possibility was denied in the *Mabo* decision which refused to entertain a challenge to the legality of colonial occupation.

All of this raises questions about the genesis and reinforcement of the idea that a claim akin to exclusive possession is a powerful one. One is left to wonder about the role of claimant lawyers in the formulation of a claim, which, with the best intentions, they hope to win for their clients. From their perspective it appears (probably correctly) that the chances of a claim being successful will be higher if the courts can clearly recognize evidence of a *system,* understood as one of normative propositions and sanctions, that resonates with its own normative understandings. This tactical decision is an interesting and problematic one, as, on the one hand, the law demands that the indigenous relationship to land be distinctly *different* to settler patterns of land use and attachment, yet, on the other hand, places value on proof of exclusive possession in the power to exclude others from land and on evidence of land 'use'. So, once again, indigenous claimants are in a double bind.

This leads us to a particularly interesting example of sedimentation, which takes the form of a response to law's demand that native title claimants evidence a 'system' of 'traditional laws and customs' continuously observed since sovereignty. In response to this demand, claimants construct and present their cultural practices in the form of the propositional normative, using the language of obligation and sanction. This seems to reflect the realization by indigenous claimants (no doubt encouraged by their lawyers) that in the common law's eyes,

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[212] 'It is not a question of ownership, it is a question of sovereignty': In "A Summary of Concerns of the Aboriginal People of Australia Distributed by NAC Chairman, Mr Roy Nichols, at the World Assembly of First Nations, Regina, Canada, 1982". Extract included in Bain Attwood and Andrew Markus, eds., *The Struggle for Aboriginal Rights: A Documentary History* (Sydney: Allen & Unwin, 1999) at 298.

'the truest belief is compulsion'.[213] Indeed, native title law has developed such that, as Povinelli states:

> [C]laimants must produce belief in such a way that someone else can calibrate the compulsive hold that the belief has on them and, by extension, the collectivity they represent. In short, the law mandates a story about interiority. And the most robust evidence of the interiority of belief is compulsion.[214]

The rhetoric of 'authenticity' reflects a judgment about interiority, the best proof of an authentic 'interiority' being compulsion.[215] What is implied in the notion of the authentic indigenous subject is a distinction between, on the one hand, traditions 'revived' (or contrived), the *seeking* of history, the *re*connection with the past. Its opposite, on the other hand, takes the form of continued tradition that exerts its obligatory force upon the (involuntary/deferential) subject. Therefore, the presentation of Aboriginal 'traditional laws and customs' in the language of the normative represents a strategic attempt to demonstrate the compulsive hold of 'traditional laws'. It seems that the power of law to paralyse alternative imaginings has afflicted both claimant lawyers and, in turn, the claimants themselves, such that native title claims are repeatedly presented in the form of the propositional normative. This is interesting as this form is not explicitly required by the legislation. The subtle and invisible way in which it has become one is, from a constitutive perspective, compelling evidence of law's power. More specifically, Povinelli would suggest, it is testament to the 'cunning' of recognition discourse in native title cases, the deceptive (and failed) promise of recognition through translation.

In an interesting extract from the *Yarmirr* transcript, the strategic translation of indigenous attachment to land into the language of law and normativity can be

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[213] Povinelli, *supra* note 1 at 235.

[214] *Ibid.* at 254.

[215] See Povinelli, "The Truest Belief is Compulsion" in *supra* note 1.

traced. Mary Yarmirr, a native title claimant, is asked how far her sea country extends between two designated points. She replies, 'As far as my eyes can carry me - carry - look towards the ocean.'[216] When asked a similar question shortly afterwards in the course of giving evidence relating to the sea country between two different points, she replies in the language of the normative;

> 'A. Right. There is a system there - a traditional system, a law, that guides us. The first one is *ajbud*, that is the sand, dry sand, the beach itself, ajbud. This is when you go to the sand, on the beach, where the water comes in, the sea.'[217]

Her subsequent evidence employs indigenous words to describe her attachment to the land in the area. However, this evidence is interspersed with awkward statements which deliberately re-link her evidence to the occidental concept of 'law'. The flow of her evidence is interrupted by these statements:

> A. *Balu* is a refuge or a deeper water where, when it is low tide, when the water goes right out, as it goes out it takes most of the marine creatures with it such as the turtles and the dugongs, the bigger ones, and they take refuge in that *balu*. It's too deep, but we can still see it, see the bottom of it.
>
> Q Right?
>
> A. That is where our old people, our law, speaks about those areas. Further it is *birrina*, but that is right out into the ocean. Right out in the ocean, that is *birrina*. We have no interest but that is the word for that area, right out *birrina*.[218]

When the issue is revisited again later by counsel, the witness responds by using the language of 'ownership':

> Q. And between that area on Darmarl Point there, between there and Danger Point on the other side of the strait, how far does the sea country of Mandilarri go to the west from there?

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[216] Extracted in *Yarmirr, supra* note 209 at [91].

[217] *Ibid.* at para. 91.

[218] *Ibid.* at para. 91. Emphasis added.

A. As I've indicated this morning, that our ownership of sea country extends to the *balu*. That's all. The *birrina* is an ocean.[219]

Finally, when pressed to be more specific about how far this area extends, what exactly is meant by 'as far as the eye can see' and whether this is sitting or standing, Mary Yarmirr seeks to retreat to indigenous concepts of attachment:

Q. You have said before in your evidence this morning about it going as far as the eye can take you, I think is the expression?

A. Yes, which is when you're sitting down on the beach or standing up, the first thing that you can see is the *balu*, before you see the *birrina*.

Q. All right. And is that ---?

A. If you can understand what I'm saying to you, because that's how we sea people, island people, identify our sea country by using those - terminology such as *birrina* and *balu*.[220]

In the above extract, the language of normativity appears deliberate and labored. It is indicative of claimant responsiveness not only to the demands made by native title law, but to its subtly orienting pull which works to mould the language and form in which claims are made and identities presented.

To the phenomenon of sedimentation or the filtering down of legal concepts into the subject's legal consciousness[221], legal pluralism has added the study of the reverse process of inter-normative transplantation. This studies the hybridity of, and interactivity between, normative systems. These phenomena are evident in the cross-fertilization of discourse, white and indigenous, that takes place in native title claims hearings. While indigenous claimants use the language of white man's law to express their connection to land and to describe their communities,

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[219] *Ibid.* at para. 91. Emphasis added.

[220] *Ibid.* at para. 91- 92. Emphasis added.

[221] 'Legal consciousness', as it is used by social scientists, is defined by Ewick and Silbey 'to refer to the ways in which people make sense of law and legal institutions, that is, the understandings which give meaning to people's experiences and actions.' Patricia Ewick and Susan Silbey, "Conformity, Contestation, and Resistance: An Account of Legal Consciousness" (1992) 26 New England Law Review 731 at 734.

white lawyers and judges also adopt indigenous concepts in submissions and witness examination.

Kirsten Anker gives examples of the first phenomenon in the use by indigenous subjects of the terms 'business', 'law' and 'country' to 'describe their world and make claims based upon it'.[222] In a native title matter I observed, male initiation rituals were described by indigenous claimants as 'going through the Law'. More generally, 'the Law' was used to describe those normative principles at the top of the hierarchy of laws, the breach of which received serious punishment. These were generally those normative principles pertaining to male restricted gender evidence. Similarly, in *De Rose,* the expression 'strong law' is used by indigenous claimants to refer to those rules relating to gender restrictions.[223] Still more loosely, the expression 'Aboriginal law' is often used to denote the general mass of 'traditional laws and customs'. As a necessary part of the making of a claim, indigenous attachment to land is translated into identifiable and severable rights, interests and responsibilities. This contrasts to an un-bounded and self-identifying conception of indigenous attachment to land:

> This land is something that is always yours; it doesn't matter what nature or politics do to change it. We believe the land is all life. So it comes to us that we are part of the land and the land is part of us. It cannot be one or the other. We cannot be separated by anything, or anybody.[224]

At the same time, legal personnel involved in the native title claims process adopt indigenous concepts and pigeon English short-hands in their oral submissions and exchanges with witnesses. One hears expressions like, 'them people', 'that mob', 'white man's law'. In the *Neowarra* trial, for example, counsel used pigeon English to ask an indigenous witness, '(t)hat law you been call out for widow, cut

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[222] Anker, *supra* note 54 at 7.

[223] *De Rose FCAFC 2, supra* note 188 at para. 85.

[224] Yunupingu, *supra* note 6 at 2-3.

her hair and make smoke and all that: who follow that law?'[225] Indigenous words are also used, for example, in cases involving the Western Desert Region, *'ngurra'* (meaning some approximation of 'my country') and '*tjukurrpa*' (referring to the set of Dreamtime stories that relate to this area). These words are detached from their signifieds and in the process a 'sense of the word is fabricated that relates to an outside description of a social structure'. [226] Other more obvious symptoms of interaction and hybridity in native title cases can be identified with the event of 'bush courts', in which judges don sun hats and shorts and preside over a sweaty 'court room' under the shade of a tent canopy. Much of the formal and ceremonial aspects of court proceedings are dispensed with on these occasions. Yet this is not received unambiguously by indigenous claimants. I was told of one occasion in which a community felt a sense of indignation that court formalities were being dispensed with, as though this was some act of disrespect for members of the community who had prepared and practiced their ceremonial role of rising and bowing to the judge.[227]

An analysis of the symbolism and meaning of the above transplants will be considered in Chapter Four. At this stage, it might merely be suggested that the appearance of accommodation gives rise to the expectation that hybridity in form and evidence will be matched by the accommodation of hybridity at the level of substance. The paradox of recognition discourse lies in the failure of that promise.

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[225] Question asked by Mr Blowes of Mabel King, quoted in *Neowarra, supra* note 166 at para. 238.

[226] Anker, *supra* note 54.

[227] This incident was reported by court staff while I was working at the Federal Court of Australia.

Chapter Four: Characterizing indigenous engagement: the limits of law's constitutive power, performativity and subject agency.

An examination of native title law's demands and indigenous claimant engagement with these demands raises critical questions about law's constitutive power and subject agency. While subject agency is implied in the argument made in Chapter Three that indigenous subjects are necessarily oriented to the native title claims process, this raises questions about the voluntariness of orientation and subjects' capacity to define their own agency. This final Chapter evaluates the power of law to compel orientation towards its terms. It also considers the capacity of law to 'saturate' subjects with the dream of materialization, in this case, as 'traditional' Aboriginal subjects. The starting point of this analysis is the now familiar critique that native title recognition discourse assumes its own detachment as well as the integrity and autonomy of individual and collective identities. By doing so, the discourse pre-supposes that which it purports to recognize, capable only of recognizing compliant alterior bodies. At the same time, as explored in the previous chapter, native title law demands that this identity be 'authentic,' not fabricated or performed. It possesses both the capacity to produce the subject it names, and, variously, impels the subject's natural affect or unveils its performance where the dissimulation is unconvincing. In this Chapter, I argue that the inevitability of subject orientation to law is a trap in which indigenous claimants are caught. In doing so, I engage with the sociolegal debate around subject consciousness. This debate pivots around the tension between the relative power of law to constrain and the subject to resist this constraint.

After introducing the terms of this academic debate, this Chapter addresses a number of related questions:

- If the subject is produced through law's constitutive power, does this deny the capacity of the subject to resist?

- Does the cross-fertilization of indigenous and white discourses challenge the 'constructivist' thesis, or is it part of the ingenuity of recognition discourse?
- What does it mean to say that some indigenous claimants become 'saturated' with the dream of 'authentic' Aboriginal identity?
- Are claimants motivated to use law and its idiom by strategy rather than false consciousness?[228] Or;
- Does the answer lie somewhere messily in between?

In conducting this analysis, I engage with relevant sociolegal scholarship, Butler's reading of performativity and some insights from legal pluralism. I argue that native title claimants exercise agency in their appropriation and subversion of the norms of Aboriginality defined by law. They do so through deviations from the script, parody and hyperbolic performance. However, I characterize these acts as symbolic and temporary victories. In turning from the psychological to the material aspects of native title recognition, I conclude that native title law ultimately outwits the Aboriginal subject by requiring the performance of identity norms then, where unconvincingly materialized, uncovering the 'masquerade'. As a consequence, subjects are declared self-interested, inauthentic and therefore undeserving of recognition and its contingent material rewards.

Sociolegal studies

The ambivalence that characterizes the relationship between law and the subaltern subject from a sociolegal perspective is captured in the description of law as both a 'resource and a constraint'.[229] Sociolegal scholarship developed as a progressive response to structuralist accounts of law, which denied or negated

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[228] Kostiner, *supra* note 66 at 328.

[229] Merry, "Everyday Understandings of the Law in Working-Class America" (1986) 13(2) American Ethnologist 253.

subject agency in an emphasis on macro-social structures and institutions.[230] In emphasising the individual subject, sociolegal scholars reject 'epiphenomenal' structuralist or Marxist modes in which individuals are seen as 'the bearers of social relations'.[231] They seek to challenge the privileging of law in the study of law and society, of which sociolegal scholars accuse both instrumentalist and constitutive approaches.[232] That is, while the emphasis of instrumentalist scholarship is said to be on law's 'effectiveness', gauged by reference to human action, the emphasis of constitutive scholarship to be on 'law's effects', gauged by reference to meanings and beliefs.[233] Both approaches are characterized as "law-first", functioning to 'mute the interactive nature of the relationship between law and everyday life'.[234]

Some sociolegal scholars have attempted to redefine 'law' to include exogenous meanings, that is, those meanings assigned to legal norms and concepts by non-lawyers, for example, the participants in a legal process or activists using law as one site of political struggle. On this view, 'law' may provide 'leverage' for political mobilization, for example by providing a framework and discourse around which to organize social movements, even when the legal outcome is adverse to the these movements.[235] In this vein, rights might be viewed as 'resources for political mobilization' rather than 'ends in themselves'[236], legal liberalism's 'myth of rights' rejected in favour of a characterization as 'the politics of rights'.[237] Merry

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[230] Ewick and Silbey, *supra* note 221 at 740

[231] *Ibid.* at 740.

[232] Sarat and Kearns, *supra* note 122 at 21.

[233] *Ibid.* at 23 and 41.

[234] *Ibid.* at 21.

[235] Kostiner, *supra* note 66 at 324. In this paper, Kostiner sets out three different justifications for activist ideas about the role of law and social change: instrumental, political and cultural.

[236] *Ibid.* at 325.

[237] Stuart A. Scheingold, *The Politics of Rights: Lawyers, Public Policy, and Political Change.* (New Haven and London: Yale University Press, 1974).

similarly frames the problem of law's constraining and emancipatory effect in a series of questions which suggest the potential for political mobilization:

> What are the possibilities of resistance through law? Is law too complicitous in relations of power to constitute a site of resistance? Does resistance by means of law simply reinforce the power and legitimacy of the legal system itself? Or, ... does it occasionally provide opportunities to challenge the power of the ruling class? Is it possible ... that the law provides a social movement ... with a discourse and a consciousness that facilitates resistance even when it loses its cases?'[238]

Significantly, Merry adds an important qualifier to 'romantic' notions of the 'authentic truth-perceiving subject', stating that:

> All resistance is not constructive, nor are all subordinate peoples able to critique the conditions of their subordination.[239]

For indigenous justice activists, the dilemma of engaging with or resorting to law as a political strategy is heightened by the paradox that the movement, in its moderate form, promotes a pluralist vision of law[240], while in its radical form, rejects the legitimacy of colonial law altogether.

The emphasis in sociolegal scholarship is therefore on the interaction of the individual with legal norms, and the impact of law on the individual's consciousness. This scholarship explores the capacity of subject resistance to effect changes in cultural meanings as well as to generate political mobilisation. However, though directing critical attention to the capacity of the individual to resist law's power over consciousness, sociolegal scholars do not deny the asymmetrical power relation that characterizes the subject's interaction with the legal system. In particular, they do not understate the power of colonial legal conceptions in establishing an authoritative language of claim making, defining

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[238] Merry, "Resistance and the Cultural Power of Law" (1995) 29(1) Law and Society Review 11 at 15. References omitted. [Merry, "Resistance"]

[239] *Ibid.* at 24.

[240] *Ibid.* at 23.

the basis of entitlement and its material rewards. This explains the central ambiguity within sociolegal scholarship which pivots around the twin conceptions of empowerment (law as resource) and constraint. Indeed, it has recently been suggested that sociolegal debate has stagnated, positioned:

> B]etween two poles ...[viewing law as] a vehicle simultaneously of governmentality and of its subversion, of subjection and emancipation, of dispossession and reappropriation ... we are left with a very basic question: Is there anything more to say on the topic, other than to offer further historical and/or ethnographic illustration?[241]

In this chapter I consider how this sociolegal 'impasse' might be reconceptualized, not only in terms of multiple consciousness or internal difference but by reference to Butler's concept of provisional performativity, the indigenous concept of *piya wedjirr* and the distinction between symbolic and material victories.

Legal consciousness

Sociolegal scholarship has devoted considerable attention to the legal consciousness of those affected by law. Much of this scholarship has concluded with the duality or paradox central to its vision of law. For example, in his study of the legal consciousness of the welfare poor, Austin Sarat describes the state of dual consciousnesses as a:

> ... consciousness of power and domination, in which the keynote is enclosure and dependency and a consciousness of resistance, in which welfare recipients assert themselves and demand recognition of their personal identities and their human needs.[242]

Other approaches have moved beyond 'duality' to describe a less structured and more fluid reality. Thus, Ewick and Silbey suggest that:

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[241] John L. Comaroff, "Colonialism, Culture and the Law: A Foreward," (2001) 26(2) Law and Social Inquiry: 305 at 307.

[242] Austin Sarat, " '... The Law is All Over': Power, Resistance and the Legal Consciousness of the Welfare Poor" (1990) 2 Yale J.L & Human. 343 at 344.

> (C)onsciousness is neither fixed, stable, unitary, nor consistent. Instead, we see legal consciousness as something local, contextual, pluralistic, filled with conflict and contradiction.[243]

However, in a return to the notion of 'constraint', the multiplicity and incoherence of legal consciousness is said to possess a 'shape and pattern' such that 'the possible variations in legal consciousness are situationally and organisationally circumscribed.'[244] In the end, therefore, Ewick and Silbey conclude that legal consciousness emerges from the play of 'strategy and tactic, of power and resistance'.[245]

Critical legal pluralism has sought to redirect sociolegal scholarship towards an understanding of subjects as 'law-creating' not simply 'law abiding'.[246] Subjects are defined as possessing 'constructive, creative capacities' and plural consciousness.[247] Though acknowledging that the subject is constructed by law, this perspective adds that the subject also engages in the construction *of* law. The subject, on this view, carries a 'multiplicity of identities', is a 'multiplicity of selves'. However, critical legal pluralism does not equate plurality with radical egalitarianism. Rather, it accepts that 'dominant narratives will, in the end ... be imposed' but that 'not all institutional narratives are equally persuasive to the

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[243] Ewick and Silbey, *supra* note 221 at 742. See also Sarat, who describes the legal consciousness of the welfare poor as 'polyvocal, contingent and variable.' *Ibid.* at 375.

[244] *Ibid.* Ewick and Silbey at 742.

[245] *Ibid.* at 743.

[246] Martha-Marie Kleinhans and Roderick A. Macdonald, "What is *Critical* Legal Pluralism?"(1997) 12(2) Canadian Journal of Law and Society 25 at 26. This invites consideration of two kinds of agency. The first, agency *within* law, is limited to subversion and resistance in the subject's interaction with State law. The second locates agency in the act of law *creation* by the subject and the selection by the subject of which normative regimes it will be bound by. A detailed consideration of the second form of agency is beyond the scope of this thesis, but raises further questions for reflection. See Roderick A. Macdonald, "Legal Republicanism and Legal Pluralism: Two Takes on Identity and Diversity" in M. Bussani and M. Graziadei, eds. *Human Diversity and the law* (Brussels: Bruylant, 2005) at 43-70 and Roderick A. Macdonald, "Against Nomopolies" (forthcoming 2006 Northern Ireland Legal Quarterly).

[247] *Ibid.* at 26. The description of critical legal pluralism that follows is derived from this article.

plethora of selves of which subjects are composed.'[248] In doing so, its point of reference is the receptivity of the individual subject to particular state narratives, rather than the power of these narratives understood in the abstract.

The experience of turning to the law affects the way people think about themselves in fundamental ways.[249] In a native title context, this is not to say that indigenous understandings are 'displaced', but that the character and status of these understandings changes as a result of the interaction. In some cases, the interaction will be strategically embraced and utilized, as some indigenous subjects 'creatively engage the impasses they face, generating new forms of social life'.[250] However, the competing demands of indigenous and colonial normative systems can produce in other subjects a paralysis in judgment, a loss of moral bearings. Povinelli suggests that some indigenous subjects are unable to reconcile the various 'discursive orders' they must negotiate, and are made *piya wedjirr*, 'head-rotten' or 'silly' as a result.[251] She describes Betty Biliwag, attending a meeting to discuss whether mineral exploration should be allowed on her country and panicked by the fact that the younger members of her community intended to vote in favour of the exploration. She instructs herself, 'No. You're not going to forget them Dreaming.'[252] In doing so, Povinelli argues, she 'found herself obliged to the Dreaming in spite of the socioeconomic sense of the mineral exploration.'[253] The idea of *piya wedjirr* adds an alternative critical conceptualisation of indigenous subject consciousness in addition to duality or plurality. This need not be understood as a permanent paralysis, however, and

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[248] *Ibid.* at 43.

[249] Merry, *Human Rights, supra* note 81 at 189.

[250] Povinelli, *supra* note 1 at 3.

[251] *Ibid.* at 3.

[252] *Ibid.* at 2.

[253] *Ibid.* at 5.

can be understood as consistent with the notion of 'multiple, dynamic and continuously produced' subjectivity adopted in this thesis.

The extracts from witness testimony in native title claims reveal something about the rhetoric used by indigenous claimants and therefore something about claimant legal consciousness.[254] It is interesting to consider what claimants understand the role of law in these cases to be. Some express what might be described as an 'instrumentalist' view, assessing law's relevance and effectivity by its capacity to deliver material benefits in the form of native title rights. Others consider it an important tool for the organization and mobilization of indigenous social movements, given that native title provides a community focus in the struggle for rights and generates social and collective action. Others consider its capacity to symbolically and authoritatively recognize indigenous entitlement to be most significant. This relates to law's cultural power to change assumptions about, for example, settler entitlement to land. Others express cynicism about the native title process, and consider it futile, if not dangerous, in the struggle for indigenous justice. These sentiments are expressed by Irene Watson (an indigenous academic), who describes the creation of native title as:

> ...as a further erosion and subversion of *Nunga* [Aboriginal] identities, and not a recognition of *Nunga* rights to land. Many native title claims compete for the same *ruwi* [area of land]; conflict is created and the *muldarbi* [white man] is successful in establishing ways of annihilating the possibility of peaceful coexistence, cunningly, in a way which appears to be establishing 'rights', as it kills.[255]

The same individual might invoke all three of these schemes at different points. This has been noted in relation to activists by Kostiner, and in relation to ordinary

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[254] A detailed examination of the relationship between consciousness and language is beyond the scope of this thesis.

[255] Irene Watson, "Buried Alive" (2002) 13 Law and Critique 253 at 260.

Americans by Ewick and Silbey.[256] This inconsistency can also be reconciled in the notion of multiple subjectivity, sometimes resulting in a state of *piya wedjirr,* sometimes giving rise to new imaginative possibilities.

Saturation and Sedimentation

The phenomena of sedimentation and appropriation, introduced in the preceding Chapter, pose difficult questions about agency and resistance. Having studied the translation of international human rights norms into local discourses, Merry argues that rights frameworks do not displace other frameworks but add a new dimension to the way individuals think about problems.[257] There is an obvious tension raised by the idea that rights frameworks *add* a new conceptual dimension without *displacing* other dimensions. The interaction of indigenous ways of understanding the world with the colonial legal system 'muddies the waters' of both in various ways. This was revealed by the examples of hybridity and cross-fertilization provided in Chapter Three. However, there is a fundamental difference in the responsiveness of each 'order' to the form, language and substance of the other. Indigenous claimants adopt the form of the propositional normative in descriptions of cultural beliefs and practices. They use the language of obligation and sanction in addition to private property concepts that derive from the common law. The substance of their claims and their self-understandings are inevitably changed in the process. By contrast, the common law system responds at the level of form to the indigenous subjects before it, the event of bush courts best exemplifying this adaptation. Further, as demonstrated in the previous chapter, indigenous and pigeon English expressions permeate the speech of common law lawyers and judges in their interaction with native title claimants. However, this is the limit of 'hybridity', the common law unprepared to

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[256] Kostiner also points out that the instrumental schema is associated with 'beginnings' where people lack basic resources and view the law as responsible for providing such resources. Kostiner, *supra* note 66 at 363.

[257] Merry, *Human Rights, supra* note 81 at 180.

respond at the level of *substance* to the indigenous subject. Ultimately, despite accommodations at the level of form and language, the common law maintains its priority, assumes the position of moral arbiter and sets the terms of that which it will recognize. Despite the appearance of recognition in translation and of particularity of indigenous identity, the law prescribes the parameters of the recognizable. It has thereby come to demand (explicitly or implicitly) that the *substance* of indigenous claim making fit within a model of the propositional normative, of ancient origin and contemporary stasis.

In Povinelli's view, the primary mechanism by which legal multiculturalism enforces its hegemony, and outwits indigenous claimants, is 'by inspiring in the indigenous subject a desire to identify with a lost indeterminable object – indeed, to be the melancholic subject of traditions.'[258] It is for this reason that defeat is felt so keenly and for this reason that the 'little piece of paper' declaring recognition is so 'precious'. However, one need ask what it means to suggest that the demands of native title law inspire 'impossible desires' in indigenous subjects, 'saturating' them with the dream of materializing as traditional and authentic? This seems to be a complex and inconsistent claim, in light of the previous emphasis on claimant orientation, consciousness and agency. 'Saturation' seems to sound much like 'false consciousness', a characterization of the subject eschewed by the sociolegal and poststructuralist approaches from which I have drawn. 'Saturation' and 'resistance' can, however, be reconciled as states of subject consciousness in the idea of multiple and fluid consciousness described above. In this Chapter I suggest that both desire for recognition and subversion of its demands may coexist simultaneously in the dynamic consciousness of the contemporary subject.

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[258] Povinelli, *supra* note 1 at 39.

Defining performativity

In seeking an alternative conceptualization of the tension in sociolegal studies between law as resource and constraint, I have found Judith Butler's concept of performativity to be most instructive. Her concepts of 'performance' and 'performativity' shed light into the debate about subject agency in the making of identity rights claims, capturing the simultaneously 'productive' and 'enabling' aspects of identity norms. The notion of performativity explains in a more dynamic (less dyadic) way than the sociolegal impasse, 'the ever-present movement in the social order and the intentionality of subjects.'[259]

In developing my analysis of subject consciousness, I have drawn most insights from *Bodies that Matter,* in which Butler engages with debate about the level of agency a subject possesses under a constructivist theory of discourse. Butler argues that the category of 'sex' (we can substitute here 'race' or 'Aboriginality') is normative 'from the start':

> In this sense then, "sex" not only functions as a norm, but is part of a regulatory practice that produces the bodies it governs, that is, whose regulatory force is made clear as a kind of productive power, the power to produce – demarcate, circulate, differentiate – the bodies it controls.[260]

This power to produce is described by Butler as 'materialization', the production of an identity effect 'through a forcible reiteration of [regulatory norms]'.[261] She also uses the term 'sedimentation' to refer to the process by which [an identity norm] acquires a naturalized effect from a 'reiterative or ritual practice'.[262] The relationship between the subject and an identity norm is one of temporal and

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[259] Cowlishaw, *supra* note 14 at 18.

[260] Butler, *Bodies that Matter, supra* note 121 at 1.

[261] *Ibid.* at 2.

[262] *Ibid.* at 10 and 11. It therefore denotes the same process as 'materialization' through 'citationality', 'the acquisition of being through the citing of power'. At 15.

spatial enmeshment.[263] However, despite Butler's conception of law's productive power, she does not therefore suggest that identity construction is totalizing and agency-denying. She does not 'do away with the subject', but '[asks] after the conditions of its emergence and operation'.[264]

Butler's critical distinction between the concepts of 'performance' and 'performativity' goes to the issue of the voluntariness of subject engagement with identity norms and suggests the limits to law's constitutive power:

> ... performance as bounded "act" is distinguished from performativity insofar as the latter consists in a reiteration of norms which precede, constrain and exceed the performer and in that sense cannot be taken as the fabrication of the performer's "will" or "choice"; further, what is "performed" works to conceal, if not to disavow, what remains opaque, unconscious, unperformable. The reduction of performativity to performance would be a mistake.[265]

Her concept of performativity is therefore both *compulsive* and *discursive.* Critically, Butler argues that Identity norms have a compulsory character with which subjects are 'forced to *negotiate*' but that does not make these norms 'efficacious'.[266] It is in their inefficacy that Butler sees the capacity for subject resistance and subversion. Therefore, Butler's conception of agency is reactive rather than active. In her view, the scope for subject agency is limited to exploiting the *fissures* within identity categories and the *excess* beyond the norm.[267] She suggests that persistent *dis*identification with an identity category might be a basis for political mobilization.[268]

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[263] "Subjected to gender, but subjectivated by gender, the "I" neither precedes nor follows the process of this gendering, but emerges only within and as the matrix of gender relations themselves." *Ibid.* at 7.

[264] *Ibid.* at 7.

[265] *Ibid.* at 234.

[266] *Ibid.* at 237.

[267] "As a sedimented effect of a reiterative or ritual practice, sex acquires its naturalized effect, and, yet, it is also by virtue of this reiteration that gaps and fissures are opened up as the constitutive instabilities in such

The very structure of native title recognition discourse, which promises material or (psychological) rewards only upon proof of compliance with an identity norm, renders it a *productive* discourse. Indeed, identity norms are not merely 'reiterated' in recognition discourse, rather, their materialization is the very condition upon which recognition is secured. In native title law, although the discourse purports to relate to Aboriginal peoples in their particularity, to recognize *their* traditional laws and customs, in fact the law has elucidated a model structure (and content) for these systems. Native title law 'demarcates' Aboriginal identity, by 'marking apart' aspects of identity that are recognisable ('so much of traditional law and custom as goes to make up native title') and failing to recognize the '"absent" rest.'[269]

The indigenous subject may subvert the prescribed identity norms which compel it in at least three ways: in refusing to comply with the relevant identity script, in the transparency of their forced negotiation of identity norms and in their excessive, parodic conformity with the norm. To begin with the first, claimants may reject legal identity norms by deliberately departing from their identity script. This is distinct from the failure to dissimulate convincingly, as it is characterized by a conscious rejection of the validity of the identity norm and intention to convey this rejection to the court. This might also be described, using Butler, as the 'incompletion of materialization'. Recall the *De Rose* witness testimony described in Chapter Three, in which a desire was expressed to economically exploit the land through cattle rearing.[270] This might be considered as an example of deliberate resistance to the subsistence model of traditional Aboriginality, an

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constructions, as that which escapes or exceeds the norm, as that which cannot be wholly defined or fixed by the repetitive labour of that norm." *Ibid.* at 10.

[268] *Ibid.* at 4.

[269] Fitzpatrick, *supra* note 123 at 249. Emphasis added.

[270] *De Rose, supra* note 187 at para. 42.

attempt to disrupt the coherence of the image of the 'traditional'. Yet it might also reflect a misguided attempt to materialize the *wrong* identity norm, for example, of the respectable Aboriginal who plans to 'make use' of the land. The inconsistent imagery of Aboriginality offers alternative identity scripts, the choice between which can be confounding. Perhaps a better example of witness defiance can therefore be found in the *Kenbi* land claims hearing. In the extract below we can see a witness' cheeky deviation from the script, and a lawyer's prompting to return to it:

> KENBI LAWYER: What was it like before the white man?
>
> TOM BARRADJAP: I don't know mate I never been there.
>
> KENBI LAWYER: Yeah, right, ha ha ha, but what was the traditional law for this place? We need to know what was the traditional law for this place.[271]

Povinelli cites the above example as one among others which 'suggest the microdiscursive nature' of attempts by indigenous subjects to 'disrupt the fantasy of traditional identity by rejecting it as the authentic and valuable difference of their person and group'.[272] However, rather than citing this as an act of indigenous subversion, Povinelli argues that this is proof of the cunning of liberal multiculturalism in that, by deviating from the script, indigenous claimants:

> ... risk not only the material values available to them through this *idea* but also the availability of future generations to stake a claim based on its semiotic remainders.[273]

This perspective is consistent with the position advanced in this thesis that the law ultimately outwits indigenous claimants, even as they are able to use it strategically, even as they may remain conscious of its limits and of the way they

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[271] Extracts from the transcript of the Kenbi Land Claim, quoted by Povinelli, *supra* note 1 at 61.

[272] *Ibid.* at 60-61.

[273] *Ibid.* at 60-61. Emphasis in original.

exceed the identity script it provides. This does not deny indigenous agency, but rather suggests the limits of its capacity to translate symbolic subversion into material rewards.

Witness departures from their identity scripts in courtroom testimony often take comic form. This creates a transient moment of awareness for all present of the performative nature of the process, the unrealistic demands which, on behalf of law, its agents are making. I recall one occasion during a native title claim in which a witness was shown a photograph of himself, holding a weapon. The witness was asked, by a barrister complicit in performance, something to the effect of 'what's that you're holding in the picture? Is that a firestick?', to which the witness responded, 'that no firestick. That a rifle. Very big firestick.'[274] Counsel's act of 'beckoning' the witness towards tradition was exposed as performance by his witness in an act of resistance to law's demand for unambiguous attachment to tradition. This may have been a powerful act in the moment in which it occurred, all present reminded of the artifice in which they were involved, the impossibility of what was being demanded of indigenous claimants. However, such moments in native title claims usually prove transient, the failure to materialize being redefined in retrospect as a failure of indigeneity.

Other witnesses, when asked how regularly they visited country, would sense the implication likely to be drawn by the court that they did not go frequently enough to qualify as a deserving 'Aboriginal'. On such occasions, the court was often reminded by the witness of the realities of contemporary Aboriginal life, the witness pointing out that he was holding down a job in a rural town and could not just abandon it to hunt kangaroos whenever he pleased. Often this would be stated in a humorous, matter-of-fact way, as if to say, 'you naïve fool, how am I supposed to pay my bills?' and again, the expectations imposed on claimants to prove native title would be exposed as unrealistically and unfairly onerous. However, I sensed that other witness, those less defiant or matter-of-fact,

[274] I have recorded the exchange as I recall it, so this is not an exact quotation.

remained silent in the face of these implications but were not unaware of them. Though some 'disrupted the fantasy' of traditional indigeneity, others, I perceived, internalized shame about their perceived failure of indigeneity, rebuking themselves for the time they should have spent engaged in 'traditional' practices rather than holding down a paying job or living close to urban amenities.

The subversion of identity norms is also revealed in the *transparency* of some claimants' negotiation of identity norms *as* compelled. By way of example, we might consider the case of Mary Yarmirr, whose seemingly concerted effort to express her worldview in the language of the normative was discussed in Chapter Three. It was there argued that this evidence had an appearance of contrivance. We sense that Mary, though *forced* to negotiate the identity norm of traditional Aboriginality, does not fully materialize as such. The deliberateness of her references to traditional law therefore functions to expose the fissures in the identity category. What Mary 'performs' works to conceal that which remains unperformable – the non-traditional, the ambivalent. Yet in this case, at least as far as the court was concerned, Mary Yarmirr's 'natural affect' was preserved, the judge commenting that she was an impressive witness, speaking with 'considerable eloquence ... her sincerity ... both patent and compelling.[275] Mary Yarmirr therefore successfully complied with the identity norm without appearing as opportunistic and therefore inauthentic. By contrast, the articulacy of a younger, educated generation of witnesses in *De Rose* attracted the suspicion of O'Loughlin J, the implication being that their evidence complied too closely with their identity script, revealing strategy and orientation. The racist implications of treating articulacy as 'un-Aboriginal' are beyond the scope of this thesis. Rather, apart from considering the implications drawn by the court from claimant orientation, this example raises for consideration both the transparency of claimant negotiation and the subversive character of the hyperbolic embodiment of an identity norm.

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[275] *Yarmirr, supra* note 209 at para. 57.

This brings us to the third way in which claimants may subvert an identity norm. In native title cases, acts of comic subversion frequently take place in response to trivial events in the court room. For example, in a case I observed, one of the respondent's counsel had great difficulty pronouncing indigenous words. Each time he 'botched' an indigenous expression the back of the court room, where the indigenous claimants were seated, would ripple with laughter. This was an empowering act of ridicule, a way to demonstrate indigenous claimants' pride in their superior cultural knowledge and to humiliate counsel. As Cowlishaw suggests, Aborigines experience as an 'immediate pleasure' the fact that 'whitefellas have no authority in relation to tribal matters'.[276] Indeed, recent critical sociological and anthropological studies of black culture have emphasized 'mischief' and 'artistry' as forms of subject resistance and subversion.[277]

> The aphorism "The master's tools will never dismantle the master's house" underestimates the power of inversion, of ironic appropriation, and of black humour.[278]

However, as will be explored in the concluding section, 'while humour can achieve a symbolic inversion of power relations, it does not ameliorate hostility.'[279]

Parody is also an important subversive strategy, within the range of 'disobedience' that law might produce:

> Where the uniformity of the subject is expected, where the behavioural conformity of the subject is commanded, there might be produced the *refusal of the law* in the form of the *parodic inhabiting of conformity* that subtly calls into question the legitimacy of the command, a *repetition of the*

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[276] Cowlishaw, *supra* note 14 at 173.

[277] See, for example, Robin D.G. Kelly, *Yo' Mama's DisFUNKtional: Fighting the Culture Wars in Urban America* (Boston: Beacon Press, 1997) and Cowlishaw, *supra* note 14.

[278] Cowlishaw, *supra* note 14 at 11. Reference omitted.

[279] *Ibid.* at 72.

> *law into hyperbole*, a rearticulation of the law against the authority of the one who delivers it.[280]

Butler describes the phenomenon of 'parody in excess' as the production by law of consequences that 'exceed' and 'confound' its intention. It is a *theatrical* citation in so far as it 'mimes and renders hyperbolic the discursive convention that it also *reverses'*.[281] In so doing, it exposes the assumptions or prejudices of the original law. The 'articulate' evidence of the younger witnesses in the *Yorta Yorta* claim might here be considered again.[282] Applying the idea of parody, one might surmise that these witnesses have responded to law's demands with an excess of conformity, this act being one of rejection of law. The same might be said of Mary Yarmirr's deliberate use of the language of 'traditional law'. However, this is a complicated claim. Firstly, because, in the case of *Yorta Yorta,* it negates the possibility that the interest of the younger generation in their history and culture stems from reasons unrelated to the legal process or the pressure to recover cultural authenticity through the revival of tradition. It is to make a claim about intention and belief. Further, law's response to this 'parody', if we can consider it as such, is also a complicating factor in terms of our characterisation of the act as subversive. On the one hand, if the parody goes undetected by the courts, the 'authenticity' of cultural attachment accepted at face value and native title awarded, then can we say that the parody has been a success, that law has been outwitted? If this is so, the rejection of law is not conveyed to those within its domain, instead appearing as compliance. Alternatively, if the parody is detected and unveiled by law as 'artifice', one need hesitate before concluding that a *rejection* of law's identity norms has thereby been conveyed to the courts. Rather, the court's declaration that the resistant claimant is, as a consequence,

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[280] Butler, *Bodies that Matter, supra* note 121 at 122. Emphasis added.

[281] *Ibid.* at 232. Emphasis in original.

[282] *Yorta Yorta FCA, supra* note 157 at para. 61. Note that this phenomenon is also interestingly discussed in Cowlishaw, *supra* note 14, with respect to the materialization of a very different, 'deformed aboriginality'. She explores the use of obscene language and the performance of 'anger and abjection', an 'amplification of stigma, a direct derisive challenge, which, through exaggeration and overuse, ultimately renders these terms meaningless'. At 74.

inadequately 'Aboriginal' and therefore not entitled to their land limits any triumph of imagination or consciousness.

Conclusion: Law's power and subject agency

In this Chapter, I have explored various forms of subject subversion of native title identity norms. I have thereby challenged the structuralist account of false consciousness and rethought the sociolegal approach to law's constraining and enabling aspects by using the concept of performativity. We might consider that the resistance of the individual subject should not be thought insignificant, but rather:

> ... the first stage in the production of alternative forms of knowledge or where such alternatives already exist, of winning individuals over to these discourses and gradually increasing their social power.[283]

However, in this final section, we turn our gaze to public institutions and question the significance of native title claimant subversions, appropriations and resistances in light of the material rewards attached to native title. As Butler argues, 'the failure or refusal to reiterate the law does not in itself change the structure of the demand that the law makes.'[284] Miming or resisting identity norms does not unsettle the hegemonic normative order and cannot transcend it. Instability is produced only at the level of the imaginary. This goes to the crux of debates about the power of law and the capacity of subjects to resist its power. Indeed, without denying the phenomenon of subject engagement, appropriation, resistance and performance, one might suggest that law compels these responses to its demands, anticipating, rewarding or punishing them accordingly. Subversion at the level of consciousness and imagination certainly occurs, but law's demands (elaborated in Chapter Three) remain much as they were, perhaps minded to broaden the terms of an identity category slightly (for

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[283] Chris Weedon, *Feminist Practice and Poststructuralist Theory* (Cambridge and Oxford: Blackwell, 1987) at 111.

[284] Butler, *Bodies that Matter, supra* note 121 at 105-6.

example, to permit hunting with guns as well as spears to fall into the identity category of 'Aboriginality') but never seriously questioning the imposition of identity categories in the first place, or the contingency of material rewards upon proof of identification with them. Whatever subversion, parody and irony indigenous subjects enact, they 'play a minor part in the "production of [public] truth" about themselves because they are outside the circuits which activate the "ensemble of rules" for this game.'[285]

Cowlishaw describes the phenomenon of indigenous subjects exercising agency by 'answering back'.[286] Her examples of this arise in the context of race relations in Bourke (an outback town in New South Wales), where indigenous subjects express cynicism about white opportunism, or where young indigenous men see themselves engaged in 'masculine rivalry' with white police. Of the latter, she writes:

> Although they know the police *will always command superior physical and legal power*, they can win *temporary or symbolic battles*, frustrating police intentions, subverting their aims, and defying their meanings and interpretations...Here we can see an example of how "the very terms of resistance and insurgency are spawned in part by the powers they oppose". [287]

The idea of 'temporary' or 'symbolic' victories conveys both the possibility of subject resistance and the structural context in which this resistance takes place. This is an important qualification, and distances my account of subject *agency* from its possible re-linking with the notion of personal *responsibility,* which some poststructuralists have been accused of facilitating by their emphasis on subject agency.

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[285] Cowlishaw, *supra* note 14 at 85, quoting Michel Foucault, "The Ethic of Care for the Self as a Practice of Freedom", in J. Berneauer and D. Rasmussen, eds., *The Final Foucault* (Cambridge, Mass. and London: MIT Press, 1988) at 6.

[286] Cowlishaw, *ibid.* at 68.

[287] *Ibid.* at 66, quoting Judith Butler, *Excitable Speech: A Politics of the Performative.* (New York: Routledge, 1997) at 40. Emphasis added.

It is only from the perspective of discursive subjectivity that it makes any sense to suggest that law *compels* compliance with identity norms in a way that is 'unmarked' by law's hand (producing also a natural affect) but that, nonetheless, the subject may continue to *dis*identify with the norm. The simplest expression of this idea lies in the provisionality of the performative - the idea that the subject's *negotiation* of an identity norm is compelled but that its 'efficaciousness' is not secured.[288] The subject does not *comply* with law, but is *mobilized* by it, both to embody and to contest its terms.[289] Bodies which fail to materialize thereby provide the necessary 'outside' to bodies that do. Indeed, as Butler notes, 'exclusion, erasure, violent foreclosure, abjection' all possess a constitutive force.[290] We might also think of this multiple subjectivity as a critical response to the emphasis in difference theory on *difference between* rather than *within* both the particular cultural group and the individual. Difference might be thought of as the '*substance* of all identity' not just an adjective for it.[291]

Law possesses a powerful authority to saturate indigenous claimants with the dream of embodying an impossible tradition. This can be a potent and destructive force even though it coexists with other aspects of consciousness that, for example, reject the validity of 'whitefella' law and identity constructions. Further, regardless of indigenous resistance, subversion and parody, the court retains the power to penalize the disobedient subject. Whatever creative appropriations may take place, the failure to materialize as traditionally Aboriginal results in the denial of the material rewards of native title. There are therefore psychological and material aspects to the denial of native title recognition. The slippery 'cunning' of

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[288] Butler, *Bodies that Matter, supra* note 121 at 237.

[289] *Ibid.* at 12.

[290] *Ibid.* at 8.

[291] Andrew Vincent, "What is so different about difference?" in Bruce Haddock and Peter Sutch, eds., *Multiculturalism, Identity and Rights* (London and New York: Routledge, 2003) at 50.

recognition discourse, its chameleon character, means that it is difficult, if not impossible, to engage its terms successfully. Its primary paradox lies in the simultaneous demand for authenticity and the adducing of performance (performativity). Claimant 'victories' are therefore temporary and symbolic in the sense that law outwits those appearing before it. Further, the paradigm of recognition remains substantially unchanged, the recognition identity script in tact, awaiting another generation of indigenous claimants to materialize or fail as indigenous.

Conclusion

> Persons who work within juridical and state jobs do care deeply about subaltern bodies, desires, and language. They seek to demonstrate their concern and to show that these bodies, desires, and language can be recognised by the law. They beckon them toward the state's remedial institutions. But insofar as they do so, they unintentionally reinstate liberal law and desire as the end of difference and they help to saturate locals with this dream.[292]

In this thesis I have critiqued the discourse of 'recognition' employed in Australian native title legislation and case law. In doing so, I approached the legislation and case law not as authoritative legal texts, but as authoritative cultural artefacts. By this I mean firstly, that these 'texts' are both reflective and productive of culture and identity and, secondly, that they are authoritative because their interpretations are backed by the power of the state to sanction or reward. My survey of recognition discourse in native title legislation and case law was set within the broader discursive context of left-liberal multicultural theories of recognition. In Chapter One, I established the theoretical origins of the discourse of recognition in contemporary multiculturalism. As a response to theories of recognition, most significantly in the work of Hegel, Taylor and Honneth, the words 'recognition' and 'authenticity' have acquired potency and become central to identity rights movements. I then explored how this discourse is applied and developed in native title law as a form of identity politics or multicultural recognition. In doing so, I identified a number of assumptions and slippages made by this discourse, its inconsistencies and shifting shape. The links between indigenous demands for 'recognition' and material resources creates a distorted discourse of recognition that vacillates between the symbolic and the substantive. I emphasized that *culture,* defined as bounded and static, forms the basis of multicultural recognition, abstracted from questions of race and class as markers of social status.

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[292] Povinelli, *supra* note 1 at 268.

In Chapter Two, I set out some key critical responses to left-liberal multicultural discourses of recognition. This was necessary to then frame the critique developed throughout the thesis of the false assumptions and constitutive effects of native title law. I emphasized the critical insights of sociolegal theory, social constructivism and critical anthropology. As native title law depends on anthropological 'constructs' and evidence, the insights that critical anthropology provides on native title recognition were considered particularly cogent. Drawing upon these critical responses, in Chapter Three, I identified and critiqued a number of demands that native title law makes of indigenous claimants. In doing so, I analysed claimant *engagement* with these demands, suggesting the tension between law's power and claimant agency.

My analysis in Chapter Four was framed by reference to concepts of subject agency, resistance, subversion and performativity. Chapter Four was an important qualifier to the earlier chapters, which emphasized law's constitutive effect, as it explored subject agency as demonstrated through parody, mimicry and subversion. I found the simultaneity of identity constitution and subject resistance to be most usefully explored by Butler, and adopted her key conceptualizations of this relationship in developing my argument. Taking Butler's cue, this Chapter sought to explore the *limits* of constructivism. I adopted the notion of 'multiple, dynamic and continuously produced'[293] subjectivity (subjectivity as a discursive process) to describe subject consciousness. This apprehends that the same subject may, at different moments or simultaneously, experience the compulsive pull to materialize as traditionally indigenous, while subverting the terms of this identity category, exploiting its fissures or materializing in excess. This multiplicity may be productive of new perspectives, but may also result in a temporary or permanent state of *piya wedjirr.*

Having explored indigenous claimant subversion of identity categories, in the final chapter I nonetheless concluded that claimant victories of imagination are

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[293] Mama, *supra* note 32 at 2.

temporary and symbolic only, due to the structural context in which they occur. This thesis has therefore started with recognition discourse, and proceeded to expose the 'impossibility of full recognition'.[294] Through this analysis, I have suggested the dangers involved in 'beckoning' indigenous subjects towards law as a remedial institution, arguing that the 'recognition' it promises possesses a slippery quality. The indigenous subject may momentarily seize it, but it instantly slips from their hands, changes its shape and in the process, changes the subject. This productive power exposes the fallacy of the static, pre-formed subject on which native title law recognition discourse is premised.

[294] Butler, *Bodies that Matter, supra* note 121 at 226.

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